No. 80-757

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Is there a private cause of action for damages against a commodity exchange (a designated "contract market" for the trading of futures contracts) and its officials under § 5(d), § 5a(8) or § 9(b) of the Commodity Exchange Act?

———•———

Related questions are presently before this Court:

Whether § 4(b) of the Commodity Exchange Act provides customers with a cause of action for damages against their brokers ("futures commission merchants") is the subject of the pending petition in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203.*

Whether § 4(b) or § 9(b) of the Commodity Exchange Act provides non-customers with a cause of action for damages against futures commission merchants is the subject of petitions to review the judgment below which are being submitted by Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson").

Parties Below

The parties to the three consolidated appeals below were:

No. 79-7402

Appellants: Neil Leist ("Leist"), Philip Smith ("Smith") and Incomco.

Appellees: New York Mercantile Exchange (the "Exchange"), Richard B. Levine ("Levine"), Howard Gabler

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* We have filed a brief *amicus curiae* with respect to the *Curran* petition suggesting that the Court consider that petition and the instant petition together.

("Gabler"), Alfred Pennisi ("Pennisi"), Clayton, Heinold and Thomson.

No. 79-7464

Appellant: Incomco.

Appellee: The Exchange.

No. 79-7482

Appellant: National Super Spuds, Inc.

Appellees: Heinold and Thomson.

The Exchange and Levine, Gabler and Pennisi seek review of the judgment in No. 79-7402. The Exchange seeks review of the judgment in No. 79-7464. The Exchange and Levine, Gabler and Pennisi were not parties to the appeal in No. 79-7482.

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IN THE

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No. .....

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the court of appeals majority and the dissent are not yet officially reported; they are unofficially reported at 2 CCH Com.Fut.L.Rep. ¶ 21,051. The opinion of the district court, whose judgment was reversed by the court of appeals, is reported at 470 F.Supp. 1256.

Jurisdiction

The judgment of the court of appeals was entered July 8, 1980. Petitioners' timely petition for rehearing, with suggestion for rehearing *in banc*, was denied on September 9, 1980. This petition is filed within 90 days of that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions

The texts of §§ 5(d), 5a(8) and 9(b) of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §§ 7(d), 7a(8) and 13(b), as well as the texts of §§ 4b, 5b, 6(a), 6b, 6c, 6d and 14 of the CEA, 7 U.S.C. §§ 6b, 7b, 8(a), 13a, 13a-1, 13a-2 and 18, are set forth in the Appendix at page 198a *et seq.*

Statement of the Case

The Exchange is one of the ten designated contract markets on which contracts for the future delivery of commodities are traded.* Petitioners Levine, Gabler and Pennisi were in 1976 the president, the vice president and the compliance officer of the Exchange. One of the contracts for future delivery traded on the Exchange is a contract calling for May delivery of Maine potatoes.

No. 79-7402—Respondents Leist, Smith and Incomco were "long" speculators in the May 1976 potato contract. They alleged that a conspiracy among "shorts" and their futures commission merchants manipulated the price of the contract downward. They also alleged that there was another conspiracy to manipulate the price upward. The

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* The other contract markets are:
Board of Trade of the City of Chicago
Board of Trade of Kansas City, Missouri, Inc.
Chicago Mercantile Exchange
Coffee Sugar & Cocoa Exchange Inc.
Commodity Exchange, Inc.
MidAmerica Commodity Exchange
Minneapolis Grain Exchange
New York Cotton Exchange
New York Futures Exchange

alleged manipulators and their futures commission merchants were named as defendants.

The Exchange and its officials were not alleged to have been party to the manipulations. Rather, it was alleged that the Exchange is "required by law to regulate activities of brokers and traders", that the activities of the Exchange "were the responsibility" of the Exchange officials, that the Exchange and its officials "negligently failed to maintain an orderly market for trading", that they "failed and neglected" to report violations of the CEA, the regulations of the CFTC and the bylaws and rules of the Exchange, that they "failed and neglected" to direct the entry of liquidating orders and that they "failed and neglected to exercise due care in policing activities of traders and brokers . . . and thereby failed to prevent the manipulative activities by the various other defendants."

No. 79-7464—In this action, Incomco sued not as a speculator in futures contracts on the Exchange but rather as a speculator in "cash" potatoes stored in Maine. Incomco alleged that two of the "long" manipulators had created an artificial shortage of railroad cars which prevented Incomco from realizing expected profits from the sale of potatoes to "shorts" who might use the potatoes to make delivery under unliquidated May 1976 contracts. The Exchange was accused of failing to use its emergency powers to extend the period for delivery or to allow delivery by truck.

The jurisdiction of the district court in No. 79-7402 in respect of the claims asserted under the CEA was allegedly found in 28 U.S.C. §§ 1331, 1337; the complaint in No. 79-7464 simply alleged the existence of a federal question, and jurisdiction was presumably based on 28 U.S.C. § 1331.

The statutory scheme—Section 5 of the CEA, 7 U.S.C. § 7, is a licensing statute which provides for the designation

by the Commodity Futures Trading Commission ("CFTC") of a contract market on which trading in futures contracts may take place when the market "complies with and carries out the following [seven] conditions and requirements . . . ." Subsection (d) reads:

> "(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board."

Section 5(d) was part of the original Grain Futures Act of 1922, ch. 369, 42 Stat. 998, which was later renamed the Commodity Exchange Act.

Section 5a of the CEA, 7 U.S.C. § 7a, is a prescriptive statute which provides that "[e]ach contract market shall . . ." comply with twelve requirements. Paragraph (8) reads:

> "(8) Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to the terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section . . . ."

Section 5a was added to the CEA in 1936, ch. 545, § 7, 49 Stat. 1497. Paragraph (8) was added in 1968, Pub. L. No. 90-258, § 12, 82 Stat. 29.

Subsection (b) of § 9 of the Act, 7 U.S.C. § 13(b), is a criminal statute which reads:

> "(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than

five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of Section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein . . . ."

Section 9(b) was part of the original Grain Futures Act of 1922, ch. 369, § 9, 42 Stat. 1003.

Sections 5b, 6(a) and 6b, 7 U.S.C. §§ 7b, 8(a) and 13a, provide for suspension or revocation of contract market designations, for cease and desist orders and for civil penalties of up to $100,000. Violation by a contract market of a cease and desist order is also a misdemeanor under § 6b. The CFTC is empowered by § 6c, 7 U.S.C. § 13a-1, to bring suit for an injunction or writ of mandamus against a contract market.

Section 4b, 7 U.S.C. § 6b, proscribes fraudulent transactions by members of contract markets and others. Section 14 of the CEA provides for an administrative reparations procedure against persons registered under the CEA,

7 U.S.C. § 18, and § 6d provides for state *parens patriae* actions against persons other than contract markets, clearinghouses and floor brokers, 7 U.S.C. § 13a-2.

The decision of the district court—The district court (Lloyd F. MacMahon, D.J.) granted partial summary judgment dismissing the claims under the Act, and a final judgment thereon was entered pursuant to Fed.R.Civ.P. 54(b).

The court concluded that the extensive amendments to the CEA in 1974 and the plenary grant of disciplinary and regulatory power to the CFTC evidenced a congressional intent to deny a private right of action under the Act.

The court noted that the CFTC, which was created by the 1974 amendments, alone has the right to assess a civil monetary penalty against a contract market. The court pointed out that the amount of the penalty is limited and that the CFTC is required to consider whether the amount of the penalty will materially impair the contract market's ability to carry out its operations and duties. The court concluded that "these limitations evidence a congressional intent to limit the potential monetary exposure of contract markets. Since neither of these limitations would be present in private actions against contract markets, the implication of a right of action against contract markets would be inconsistent with the manifest intent of Congress to limit the potential monetary liability of contract markets." (179a) The court also noted that Congress had amended the Act as recently as 1978, and that in enacting these amendments "Congress again failed to add a section expressly providing for a private right of action despite knowledge that a number of district courts had held that the private right of action previously implied did not survive the 1974 amendments." (182a; footnote omitted)

The decision of the court of appeals—The court of appeals majority reversed in an 88-page slip opinion by Judge Friendly joined in by Judge Kearse.

While the district court held that the failure of Congress to enact a private cause of action in 1974 indicated that none was intended, the court of appeals majority found that the same failure indicated an intent not to "repeal" the private causes of action by customers against their brokers which a number of district courts had implied beginning in 1967, and the action which one court of appeals had in 1973 implied against a contract market, *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds per curiam sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).

The majority cited the decisions, particularly *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), and *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944),* which had recognized "implied" causes of action under certain provisions of the Securities Exchange Act of 1934 as support for its ruling with respect to the CEA. The majority stated the question to be "not whether all these decisions were wrong in the light of Supreme Court opinions of the past four years, as the dissent necessarily implies, but whether the 1974 Congress was not justified in assuming they would be followed with respect to the CEA." (34a)

The majority found that Congress was aware in 1974 of the decisions which had sustained "implied" private causes of action, citing the report of the House which referred

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* Judge Clark's statement in *Baird* v. *Franklin*—"the common law will supply a remedy if the statute gives none" (141 F.2d at 245 (dissenting in part))—is a classic example of the application of common law doctrine in the federal courts. This Court has said that an argument based upon that doctrine is "entirely misplaced." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979).

to "a growing body of opinion" that contract markets might be sued for a failure to enforce their rules (57a) and the statement of the sponsor of the 1974 amendments that the judgment of the contract markets in performing self-regulatory functions was "becoming increasingly a justiciable issue." (58a) The majority placed "[t]he burden . . . on those who urge that the 1974 amendments demonstrate an intention to change prior law . . . ." (46a)

The majority said it was "unnecessary to dwell on just how far the recent triad of *Cannon, Redington* and *Transamerica* may have gone in limiting the implied cause of action." (76a) The majority explained this statement by distinguishing *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979), which held there was no implied right of action under § 17(a) of the Securities Exchange Act, and *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979), which held there was no implied right of action under § 206 of the Investment Advisers Act, as decisions "consider[ing] statutes which were enacted *prior* to the great explosion in judicial recognition of implied rights." (77a) The majority took the view that the "congressional action . . . involved in this case" was the 1974 amendments to the CEA, rather than the enactment of §§ 5(d) and 9(b) in 1922 and of § 5a in 1936 and the addition of paragraph (8) to § 5a in 1968. *(Id.)*

The dissent—Judge Mansfield, dissenting in a 76-page slip opinion, concluded that the CEA "fails completely to reveal any Congressional intent to approve, much less create, an implied private right of action in favor of these plaintiffs-appellants . . . against contract exchanges (such as the New York Mercantile Exchange and its officers). On the contrary, Congress expressly provided a pervasive panoply of judicial and administrative means for enforcing compliance with the Act, including civil fines, compensatory

reparations, arbitration, cease and desist orders, and criminal penalties, which may reasonably be viewed as exclusive." (91a-92a) Judge Mansfield found that "[t]he legislative history of the Act, which runs into hundreds of pages of Committee reports, testimony and debates, fails to contain one word approving a private right of action .... On the contrary, in 1974 Congress failed, after exhaustive hearings, to enact any one of several bills which would have expressly provided a private right of action for violations of the Act." (92a-93a)

Judge Mansfield disagreed with the majority's ruling that "a private right may be implied in the absence of a Congressional statement of the opposite intent." (94a-95a) He also disagreed with the majority's view that Congress's failure to overrule the pre-1974 cases implying a private remedy constituted endorsement of those cases. Citing *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), Judge Mansfield said: "Congress is not under any duty to state that the various remedies provided by it are exclusive, much less to disavow or dissociate itself from prior lower court decisions as if they were statutes enacted by it." (94a)

Reasons for Granting the Writ

The writ should issue (i) because the court of appeals decided an important question of federal law which has not been, but should be, settled by this Court and (ii) because the decision of the court of appeals conflicts in principle with the decisions of this Court.

1. *The importance of the question*—The majority opinion rightly characterized the question of whether there are private causes of action for breach of the CEA as an

"important issue [which] has divided the district courts." (5a) The question has not been addressed by this Court.

This petition presents for the first time the question of whether Congress intended, but did not so provide, that, in addition to the administrative and penal sanctions of the CEA, contract markets and their officials be subject to what the dissent below described as a "potentially devastating remedy . . . under which liability could amount to hundreds of millions of dollars." (101a)

The importance of this question is acutely perceived by the contract markets in carrying out the self-regulatory functions entrusted to them by the CEA. They are the targets of damage actions if they act or if they do not act. To illustrate, the Exchange was sued here because it did not take emergency action in 1976 which respondents alleged was appropriate. In 1977, it was sued because it did take emergency action. *P. J. Taggares Co.* v. *New York Mercantile Exchange*, 476 F.Supp. 72 (S.D.N.Y. 1979) (complaint dismissed for failure to allege that the Exchange acted in bad faith). In 1979, the Exchange was again sued for taking emergency action. *Jordon* v. *New York Mercantile Exchange*, No. 79 Civ. 3157 (ADS) (S.D.N.Y.) (placed on suspense calendar pending disposition of this petition).

We would argue that to foster the threat of damage actions against a regulatory body is unwisely to inhibit it in the exercise of its functions. But, whatever the better of that policy question, whether Congress, although it did not say so, intended the result reached by the majority below is a question worthy of consideration by this Court.

Apart from its importance to the regulation by the contract markets of trading in futures contracts and to the contract markets themselves, the question presented is of importance to the administration of justice and to the fed-

eral courts. Despite the fact that a denial of certiorari has no substantive significance, if the decision below is allowed to stand without review it is probable that the district courts will accept the existence of a cause of action for damages against contract markets as established. They will then pursue what the majority opinion described approvingly as "the process of delineating the precise contours of the private cause of action." (37a) As with the cause of action which the lower federal courts had "implied" from § 10(b) of the Securities Exchange Act and in which this Court many years later "acquiesced", *Cannon* v. *University of Chicago*, 441 U.S. 677, 692 n.13 (1979), the lower courts and ultimately this Court will be faced with questions akin to those presented by that cause of action. *Cf. Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977).

Moreover, when the ambiguities of an "implied" cause of action are coupled with the immense damage claims which the class action device permits, there are extraordinary pressures compelling settlement as this Court has recognized. *Blue Chip Stamps, supra*, 421 U.S. at 740-43. Any practitioner experienced in securities class action litigation is aware that such actions are commonly settled for amounts which are relatively small percentages of the theoretical class claim but which in absolute terms are very considerable indeed. This is the vista the decision below opens up in the field of futures contract trading.

In the securities field, the class claimant universe is generally limited to purchasers or sellers of a particular security. Here the class claimants, so the majority below suggests, may include not only traders on the contract market in the particular futures contract but all those, like

Incomco (*see* p. 3, *supra*), interested in the cash commodity itself, so long as the price of the commodity is indirectly affected by the wrongdoing the contract market supposedly failed to prevent. An "implied" cause of action of these dimensions does indeed contemplate liability for "hundreds of millions of dollars."

Whether Congress intended that there be such a remedy against contract markets—the four judges below divided evenly—should be settled by this Court.

2. *The conflict with this Court's decisions*—The author of the majority opinion some twenty-five years earlier delivered the Cardozo Lecture which he entitled *In Praise of* Erie—*and of the New Federal Common Law,* 39 N.Y.U. L. Rev. 383 (1964). The second object of his praise was what he called "specialized federal common law", *id.* at 405, premised by the judiciary upon such matters as a statutory grant of jurisdiction, *id.* at 412. He predicted the outcome in *Borak,* which was premised upon the jurisdictional grant of § 27 of the Securities Exchange Act. He commented:

> "One of the beauties of [the 'new federal common law'] for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function—with Congress always able to set matters right if they go too far off the desired beam." *Id.* at 419 (footnote omitted).

The decision of the majority applies this concept to the provisions of the CEA. It applies a body of precedent "going back to *Texas & Pacific R. Co.* v. *Rigsby,* 241 U.S. 33

(1916)." But in *Redington* and *Lewis*, upon which the majority below thought it "unnecessary to dwell," this Court ruled otherwise.

There is a plain conflict in principle between this Court's rulings and the decision below. The conflict was not resolved by the majority's assertion that Congress may legislate by silence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 10, 1980

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 402, 403, 404—September Term, 1979

(Argued January 16, 1980 Decided July 8, 1980)

Docket Nos. 79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, P. J. TAGGARES & CO., HENRY A. POLLACK, HARVEY B. POLLACK, HARVEY B. POLLACK COMPANY, GERALD RAFFERTY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLIGHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, ROBERT EDELSTEIN, MURIAL EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, ROBERT REARDON, F.J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER, HORNBLOWER & WEEKS-HEMPHILL, NOYES INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING INC., HUGH GLENN, GEARHEART FARMING, INC., EDWARD MCKAY, "JOHN" HUMPHREYS, FRANK FULLMER,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

INCOMCO,

Plaintiff-Appellant,

—v.—

WAYNE COUNTY PRODUCE CO., and HAROLD COLLINS,

Defendants,

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. CHINER, EUGENE P. WEISMEN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—v.—

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., PRESSNER TRADING CORP.,

JACK RICHARD SIMPLOT, J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., PETER J. TAGGARES, P.J. TAGGARES CO., C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH V. GLENN, GEARHEART FARMING, INC. and ED MCKAY,

Defendants,

HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

B e f o r e :

FRIENDLY, MANSFIELD and KEARSE,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, 470 F.Supp. 1256 (1979), granting partial summary judgment to the New York Mercantile Exchange and three futures commission merchants, defendants in three consolidated actions wherein plaintiffs claimed damages arising out of the default by sellers of the May 1976 Maine potato futures contracts, on the ground that there is no private cause of action for damages under the Commodity Exchange Act, 7 U.S.C. §§ 1-19.

Reversed.

LEONARD TOBOROFF, Esq., New York, N.Y. (Robson & Toboroff, New York, N.Y.), *for Plaintiffs-Appellants Neil Leist, Philip Smith and Incomco.*

POMERANTZ, LEVY, HAUDEK & BLOCK, New York, N.Y. and
HOLLINSHEAD and MENDELSON, Pittsburgh, Pa., *for Class Plaintiffs-Appellants.*

WILLIAM E. HEGARTY, Esq., New York, N.Y. (Cahill Gordon & Reindel, New York, N.Y., Charles Platto, Esq. and Peter Leight, Esq., Of Counsel) and
REIN, MOUND & COTTON, New York, N.Y. (Maurice Mound, Esq., Of Counsel), *for Defendants-Appellees New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi.*

LAWRENCE H. HUNT, Esq., Chicago, Ill. (Sidley & Austin, Chicago, Ill.) and
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, New York, N.Y. *for Defendant-Appellee Heinold Commodities, Inc.*

W. STANLEY WALCH, Esq., St. Louis, Missouri (Thompson & Mitchell, St. Louis, Missouri, Gerard K. Sandweg, Esq. and Kenton E. Knickmeyer, Esq., Of Counsel) *for Defendant-Appellee Clayton Brokerage Co. of St. Louis, Inc.*

HALL, MCNICHOL, HAMILTON, CLARK & MURRAY, New York, N.Y. *for Defendant-Appellee Thomson McKinnon Auchincloss Kohlmeyer Inc.*

MARK D. YOUNG, Esq., Washington, D.C. (John G. Gaine, General Counsel, Pat G. Nicolette, Deputy General Counsel, and Gregory C. Glynn, Associate General Counsel, Washington, D.C., Of Counsel), *for Amicus Curiae Commodity Futures Trading Commission.*

FRIENDLY, Circuit Judge:

Plaintiffs in three consolidated actions in the District Court for the Southern District of New York appeal from an order of Judge, now Chief Judge, MacMahon, 470 F.Supp. 1256 (1979), granting appellees' motions for partial summary judgment. The court struck from the complaints all claims based on the Commodity Exchange Act, (CEA), 7 U.S.C. §§ 1-19, as amended in 1974, as distinguished from other claims under the antitrust laws. The actions were to recover damages allegedly suffered by the plaintiffs as a result of what Judge MacMahon characterized as

> the much publicized default in May 1976 of Maine potato futures contracts, when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country. 470 F.Supp. at 1258 (footnote omitted).

The basis for the court's order was that no private cause of action exists for breach of the CEA. Since this important issue has divided the district courts, including those within our circuit, we feel constrained

to discuss it in some detail.[1] We think it desirable, as did the district court, to begin with an explanation of the nature of the commodity futures markets.

I. COMMODITY FUTURES MARKETS

A commodity futures contract is simply a bilateral executory agreement for the purchase and sale of a particular commodity. The seller of the contract commits himself to deliver the commodity at a fixed date in the future, while the buyer commits himself then to accept delivery and pay the agreed price. 1 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 4.6 (421)(1979); H. R. Rep. No. 93-975, 93d Cong., 2d Sess. 130 (1974). Every aspect of the futures contract is standardized except price. For example, the contract involved in this case, the May 1976 Maine potato futures contract, is for 50,000 pounds of Maine grown potatoes of a specified quality to be delivered at specified points in cars of the Bangor & Aroostook Railroad, between May 7 and May 25, 1976. Since price is the only variable, negotiations can readily proceed and the agreed prices can be speedily disseminated to

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1 The length of our treatment, particularly the explanation of the nature of the Commodities Futures Market in Part I and the history of congressional regulation in Part III, is also partly due to the fact that when the case was argued and for some time after the majority opinion was prepared, no court of appeals had passed on the question and we anticipated being the first to do so. However, in a case decided May 12, 1980, a divided panel of the Court of Appeals for the Sixth Circuit reached the issue *sua sponte* and, in an excellent and succinct opinion, held, as we do, on largely the same reasoning, that there is an implied private right of action under the CEA. *Curran* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (May 12, 1980). Although, as argued in the dissent, *Curran* involved a suit by a customer against a broker, the court did not limit its reasoning to that situation.

other traders. Standardization also makes the contracts fungible. Original sellers and buyers can therefore offset their positions by acquiring opposite contracts, either paying or gaining any price differential. H. R. Rep. No. 93-975, *supra*, at 130.

The person who has sold a futures contract, i.e., someone committed to deliver the commodity in the future, is said to be in a "short" position. Conversely, someone committed to accept delivery is "long". It is a rare case, however, in which actual delivery takes place pursuant to a futures contract.[2] Save in these rare instances, the short and the long must liquidate their positions prior to the close of trading in the particular futures contract. Although the means by which this is done is routinely referred to as futures trading, futures contracts are not "traded" in the normal sense of that word. Rather they are formed and discharged. Clark, *Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 Emory L. J. 1175, 1176 (1978). A person seeking to liquidate his futures position must

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2 See H. R. Rep. No. 93-975, *supra*, at 129 (less than 3% of all futures contracts culminate in delivery); T. Hieronymus, Economics of Futures Trading 41 (1977) (less than 1%). Neither the speculative investor nor the person using the futures market as a hedge for his position in the market for the actual commodity generally desires delivery. H. R. Rep. N. 93-975, *supra*, at 129. See *Volhart Brothers, Inc.* v. *Freeman*, 311 F.2d 52, 55-56 (5 Cir. 1962); Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges* 73 Yale L. J. 171, 173 (1963).

In occasional instances, however, people do use futures trading as an alternative market for the physical commodity. H. R. Rep. No. 93-975, *supra*, at 132. Delivery is made through the clearing house by transfer of warehouse receipts or rights to loaded freight cars and then transported according to the purchaser's instructions. See *Cargill, Inc.* v. *Hardin*, 452 F.2d 1154, 1157 (8 Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

form an opposite contract for the same quantity, so that his obligations under the two contracts will offset each other. Thus, a short who does not intend to deliver the commodity must purchase an equal number of long contracts; a long must sell an equal number of short contracts. Money is made or lost in the price differential between the original contract and the offsetting transaction. If the price of the future has declined, usually because of market information indicating a drop in the price of the commodity, the short will realize a profit; if the futures price has risen, the long will realize a profit. See *Cargill, Inc.* v. *Hardin*, 452 F.2d 1154, 1157 (8 Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). Futures trading is a zero-sum game. Since money is made from the change in futures contract prices, and every contract has a long and a short, every gain can be matched with a corresponding loss. See Melamed, *The Mechanics of a Commodity Futures Exchange: A Critique of Automation of the Transaction Process*, 6 Hofstra L. Rev. 149, 166 & n.39 (1977).

The mechanics of the commodity futures market, and the roles of the various participants, can be illustrated by tracing a typical transaction. An individual wishing to invest in the futures market approaches a "futures commission merchant" (FCM). FCM's are defined in the Commodity Exchange Act as individuals or associations "engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery . . . on . . . any contract market . . . ," § 2(a)(1), 7 U.S.C. § 2, and they are registered with the Commodity Futures Trading Commission (CFTC). The FCM will demand a "margin" payment from the customer, which is simply a security deposit designed to protect against adverse price movements. The amount of the margin is

based upon the amount which the customer can lose in a day or two; when the margin is exhausted the FCM will call the customer for additional payment. The margin is generally only a small percentage of the value of the contract. See Melamed, *supra*, 6 Hofstra L. Rev. at 167 & n.41. FCM's are paid a commission on their customer's business.

The FCM relays its customer's order to one of its "floor brokers" trading on the exchange. The broker stands on the outside of a "pit" or "ring" around which are gathered other persons trading in the same contract. Some of the traders are brokers acting on behalf of customers, while others trade on their own account. Contracts are made by "open outcry". The broker with an order will indicate his position at the pit by shouting and gesticulating with standardized hand signals. Someone willing to enter the contract responds across the pit in similar fashion, and the deal is made. Observers on raised pulpits alongside the pit record the transaction and feed the information into a communications system, publicizing it to other traders who, in any event, had an opportunity to witness the transaction in the pit. The broker relays the particulars of the deal to the FCM, who informs the customer.

When two traders have reached an agreement on the floor of the exchange, the role of the clearinghouse comes into play. The clearinghouse, a key link in the futures trading system, operates as the seller to all buyers and the buyer from all sellers, thus facilitating the interchangeability of the contracts and the cancelling of positions. H. R. Rep. No. 93-975, *supra*, at 149; S. Rep. No. 93-1131, 93d Cong., 2d Sess. 17 (1974); *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1156. Not all FCM's are clearinghouse members; those that are not

must deal through one that is. The clearinghouse treats FCM's as principals in trading transactions and demands margin payments from them. The clearinghouse requires FCM's to "mark to the market" at the close of every trading day. Any net gain or loss which the FCM has sustained in the course of the day's trading is computed and margin adjustments are made accordingly. Melamed, *supra*, 6 Hofstra L. Rev. at 167-68.

Generally speaking there are two classes of traders in commodity futures contracts, although, as some of the facts of the instant cases indicate, the distinctions between them are often quite blurred. A "hedger" is a trader with an interest in the cash market for the commodity, who deals in futures contracts as a means of transferring risks he faces in the cash market. See H. R. Rep. No. 93-975, *supra*, at 131, 133, 162. See also the complicated definition of "bona fide hedging transactions and positions" promulgated by the CFTC, 17 C.F.R. § 1.3(z). The owner of a commodity can hedge against declining prices by entering into equivalent short futures contracts for the month when he expects to be able to sell, and a processor (e.g., a miller) can hedge against increasing prices by going long for the month when he will need the commodity. Losses caused by a decline in prices on the cash market in the former case or an advance in the latter will be offset by profits in the futures transactions. See generally H. R. Rep. No. 93-975, *supra*, at 130-34; *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1157-58; Note, *supra*, 73 Yale L. J. at 171-73. The benefits of hedging extend beyond the immediate participants in the transactions. "Because hedging of price risks in a futures market enables a merchant to reduce the exposures he has in doing

business, he is able to operate on a lower profit margin with consequent lower prices to the consumer." H. R. Rep. No. 93-975, *supra*, at 132-33; see also S. Rep. No. 93-1131, *supra*, at 18; Valdez, *Modernizing the Regulation of the Commodity Futures Markets*, 13 Harv. J. Legis. 35, 40 (1975).

The system would not function, however, if only hedgers sold and purchased commodity futures contracts.[3] While hedging performs an insurance function, it is actually quite different from insurance. The risks faced by those dealing in the "cash" market, the market for the actual commodity, are not spread among those similarly situated, as with insurance, but rather are shifted to others. Bianco, *The Mechanics of Futures Trading: Speculation and Manipulation*, 6 Hofstra L. Rev. 27, 32 (1977); *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1158. The speculative investor, with no underlying interest in the cash market, is essential to take on the risks which the hedgers want to shift. The critical role of the "speculator" was described at some length in the House Report on the 1974 amendments:

> The principal role of the speculator in the markets is to take the risks that the hedger is unwilling to accept. The opportunity for profit makes the speculator willing to take those risks. The activity of speculators is essential to the operation of a futures market in that the composite bids and

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3 Johnston, *Understanding the Dynamics of Commodity Trading*, 35 Bus. Law. 705, 709 (1980), states that "[a]s a general rule, for a market to be broad enough to be efficient and to accomodate the extremely large orders that come in from time to time from dealers and commercial firms, 50 to 75 percent of the open interest and volume of trading must come from speculators—this is essential for there to be a viable market."

> offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match. H. R. Rep. No. 93-975, *supra*, at 138.

As commentators have noted, "Congress itself has recognized that the investor—although he is commonly referred to as a speculator in this context—is what makes the commodity futures market work . . . ." Bromberg & Lowenfels, *supra*, at § 4.6 (462).

Indeed, there is no bright-line difference between hedgers and speculators. Hedgers frequently do not merely balance their cash market risks in the futures market but engage in some speculation as well, buying or selling more or less futures contracts based on price expectations. Note, *Abuses in the Commodity Markets: The Need for Change in the Regulatory Structure*, 63 Geo. L. J. 751, 768-70 (1975); Valdez, *supra*, 13 Harv. J. Legis. at 64-65. On the other hand, speculators can become involved in the cash market as the activities of the plaintiff Incomco will demonstrate.

II. THE ALLEGED FACTS AND THE PROCEEDINGS BELOW

The facts alleged in the three complaints here before us are broadly as follows:[4]

John Richard Simplot is an Idaho potato entrepreneur who controls J. R. Simplot and Co., Simplot Products Co., Inc., and Simplot Industries, Inc. These corporations are responsible for the processing of approximately 50% of all Idaho potato products processed and sold in the United States. Peter J. Taggares is a Washington potato entrepreneur. He and his company, P. J. Taggares Co., process approximately 30% of all the Washington potatoes processed and sold in this country. Simplot and Taggares are equal partners in the ownership of Simtag Farms, a large farm in the State of Washington for the growing and warehousing of potatoes. Together Simplot, Taggares, and the companies they control are the largest purchasers of potatoes throughout the western potato region of Washington, Idaho and Oregon.

According to the complaints, Simplot, Taggares, and the companies controlled by them, together with numerous co-conspirators, embarked in the spring of 1976 on a conspiracy to depress the price of the May 1976 Maine potato futures contract traded on the floor of the New York Mercantile Exchange (the "short conspiracy"). As stated by one of the complaints, "[b]y virtue of their position in the potato processing field and the quantity of potatoes purchased by them, [the

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4 We say here once and for all that our statement, in large measure, is simply what the plaintiffs contend to be the facts and is not to be read as one of facts found. Accordingly we will generally dispense with use of words such as "allegedly", "asserted" and "claimed".

conspirators] would be in a position to control the prices paid for potatoes but for the existence of the Exchange and the activity . . . in buying and selling potato futures contracts." Simplot had encountered difficulties in the course of his customary negotiations with the Idaho Potato Growers Association, because the IPGA believed that the price of potatoes, including Maine potatoes, would be much higher than what Simplot was offering. Futures prices supported this view. A report issued on April 13, 1976 by the United States Department of Agriculture indicated that total potato stocks were down 11%, and that Maine stocks totalled only 7.4 million cwt. compared with 13.0 million cwt. on hand the previous year. An earlier report issued in August 1975 estimated that national potato acreage would be down 8% from the previous year with an even greater drop in Maine. The effect of this latter report, and other generally available information, was to drive the price of the May 1976 Maine contract from $9.75 per cwt. to a record high of $19.15 per cwt. by October 3, 1975. The activities of the short conspirators were designed to counteract the impact of these reports and other market information and rumors tending to raise the price of Maine futures. A decline in the price of potato futures would suggest to those dealing in the cash market, such as the IPGA, that supplies of Maine potatoes would be greater than earlier anticipated, and that prices in spot transactions or negotiations for all potatoes should correspondingly recede.

The primary means by which the short conspirators sought to depress the futures price was the accumulation of a large net short position in the May contract. The conspirators allegedly agreed to sell a large number

of contracts short and to refuse to liquidate these shorts at a price higher than that agreed among themselves and, if necessary, to default on the obligation to make delivery on all unliquidated contracts. Such short purchases would give the impression of the existence of a large supply of deliverable Maine potatoes and drive down the price of the contract.

Simplot made $1 million available to Simtag Farms, which Simtag used to open a credit balance on March 29, 1976, with Pressner Trading Corp., a member of the New York Mercantile Exchange (the Exchange or NYME), for the purpose of buying and maintaining short positions in the May contract. At the same time, Simplot, Taggares and their other companies also began to accumulate a large number of short contracts. The brokers through which the conspirators acquired their positions included Clayton Brokerage Co. of St. Louis, Inc. (Clayton), Heinold Commodities, Inc. (Heinold), and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc. (Thompson). These three brokerage firms were, like Pressner Trading, clearing members of the Exchange and appropriately registered with the CFTC. The firms allegedly knew, or should have known, that their customers neither intended to nor would be able to cover the large number of short positions the brokers acquired for them.

On May 4, 1976, Simplot and Taggares were warned by the CFTC that it was aware of their large short position and that price manipulation was a violation of the Commodity Exchange Act. The telegram concluded that although this "is not an allegation of price manipulation, if prices of the May 1976 potato future . . . should become artificial during liquidation due to

your action or inaction, we will consider whether you and your firm should be charged with price manipulation under the Commodity Exchange Act." In the face of this warning, and the impending close of trading on May 7, the conspirators not only failed to take steps to liquidate their large short position but actually increased it, again with the help and support of the named brokerage firms. On the last day of trading they consolidated all the short positions they controlled in the hands of Pressner. Clayton, Thompson and Heinold knowingly acquiesced in this consolidation designed to concentrate the force of the manipulation.

In addition to the accumulation of a large net short position which they refused to liquidate at higher than an agreed price, the conspirators also allegedly manipulated the futures price by shipping large quantities of unsold Idaho potatoes to the Maine markets for immediate sale at the going price. The use of such so-called "roller cars", railroad cars of potatoes shipped although there is no pre-determined buyer, tends to depress the market price, and thus affect futures prices.

Simplot and Taggares were not the only group manipulating the price of the May future. A second group of eastern conspirators thought they could beat the western producers at their own game. Harold Collins and Casper Mayrsohn are Maine potato merchants and traders in Maine futures. MFX Commodities, Inc., with Donald Silver as its president, is a foreign corporation engaged in business as a FCM. This group learned of the conspiracy of Simplot and Taggares and conspired to squeeze them. Pursuant to this conspiracy (the "long conspiracy"), the "long" group purchased as many contracts as it could, and then at

the same time maneuvered to tie up the cash potato market so that the shorts could not make delivery. The longs reasoned that if the shorts had no access to deliverable potatoes, the longs would be able to dictate the price the shorts would have to pay to liquidate their contracts. The main way in which the longs tied up the cash markets was by tying up all of the rail cars of the Bangor & Aroostook Railroad, which alone could deliver potatoes to satisfy May futures contracts. This was done by using the cars for phony export shipments and leaving them loaded or only partially unloaded when they reached appropriate destinations.

Neither the longs nor the shorts would give in to the other. The shorts refused to liquidate their position by buying offsetting long contracts at higher than the price agreed among them; the longs refused to come down to the unreasonably low price demanded by the shorts. At the end of trading on May 7, the short conspirators controlled 1893 open short positions. The long conspirators controlled 911 open long positions. There are usually only approximately 200 open contracts at the end of trading on the May potato future.

The plaintiffs were caught in the middle between these two competing conspiracies. Neil Leist is a duly licensed member of the Exchange engaged in the business of trading commodities and futures for his own account. Incomco, a partnership, is a duly licensed FCM. Philip Smith is Incomco's managing partner. The class action plaintiffs are traders and dealers representing all persons "who held a net long position in Contracts and who liquidated their long position in said contract between April 13, 1976 and the close of trading on the Exchange on May 7, 1976."

On the basis of the same sort of information which motivated Simplot and Taggares to conspire to depress the price of the contract, plaintiffs believed there was an investment opportunity on the long side of the contract. If there was going to be a shortage of deliverable Maine round whites, those committed to deliver potatoes at a set price might well find this price to be under what the potatoes were worth. The shorts would then have to sustain a loss, either by purchasing potatoes in the cash market for the higher price and delivering them for the lower futures contract price, or by purchasing an offsetting long position. The price of the long position should have gone up due to the shortage, so that the shorts would lose the differential in liquidating. The shorts' loss would be the longs' gain, and it is this gain which the plaintiffs sought to realize by their investment.

All the plaintiffs invested heavily on the long side of the May contract. In addition, Incomco developed a position in the cash market. It had accepted 1,500,000 pounds of Maine potatoes delivered to it pursuant to the March futures contract, and planned to sell these potatoes to those short the May contract who needed supplies to satisfy their delivery obligations. Anticipating a cash market shortage, Incomco expected to sell its potatoes at a handsome premium.

Because of the conspiracies, however, plaintiffs not only did not realize the gains they claim they would have had in an unmanipulated market but suffered losses. The short conspirators continued to accumulate short positions when they should have been trying to liquidate by purchasing long contracts from plaintiffs, and refused to liquidate above a set price. In the face of the unnaturally falling price, the plaintiffs were forced

out of the market at a loss. Because the long conspirators had successfully tied up all the freight cars of the Bangor & Aroostook, Incomco was unable to deliver its warehoused potatoes to persons seeking delivery to fulfill short contracts. As the warm weather set in, the 1,500,000 pounds of potatoes became rotten, and Incomco's total investment was lost.

The Exchange allegedly figured in this debacle almost from the start. In March, Richard Levine, president of the Exchange, told plaintiff Leist that the Exchange was investigating the large number of open positions in the May contract. On April 28, two members of the CFTC eastern region office, Howard Bodenhamer and Marshall Horn, met with Levine and Howard Gabler, vice-president of the Exchange, to express their concern over the problems developing with the May contract. Levine recognized the problem and expressed the view that Simplot might be trying to create difficulties in the contract. A second meeting took place two days later, at which Bodenhamer told Levine that the Commissioners felt that "the Exchange should take more action than less to bring about orderly liquidations of the maturing futures."

Levine did not report these meetings with the CFTC to the Exchange's Board of Governors until after the close of trading on the May contract. Although the Exchange knew, or should have known, of both the short and the long conspiracies, it took no action to prevent manipulation of the market. The Exchange failed to declare an emergency situation pursuant to its rules to facilitate orderly liquidation, and, once trading had closed, failed to take appropriate steps such as permitting delivery by truck or buying potatoes to cover the default of the shorts.

The complaint in *Leist* v. *Simplot* was filed in the District Court for the Southern District of New York on September 30, 1976. Count I, directed against the short conspirators and their brokers, charged that the activities of the group constituted violations of 7 U.S.C. §§ 1-13 and, more specifically, that the group used and employed manipulative devices and contrivances in violation of 7 U.S.C. § 13, which makes such action a felony, and of rules promulgated by the CFTC. In addition to naming the brokers as conspirators, Count I specifically alleged that they "failed and neglected to enter liquidating orders" for the short conspirators prior to the close of trading "even though they knew that such short positions could not be covered and that there would be a default if the accounts were not closed out", permitted the short sales to be made and cooperated in making such short sales "although they knew or should have known that the sellers did not intend to and would be unable to cover such short positions." Count II of the complaint charged various violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, which are not subject to the present appeal. Count III was directed against the long conspirators, describing the facts outlined above and charging that such conduct violated 7 U.S.C. §§ 1-13. Count IV was directed against the Exchange and its officials. After repeating the earlier general allegations against the short conspirators, the complaint charged that these defendants "negligently failed to maintain an orderly market for trading in Maine Futures in violation of the duties imposed upon them under the provisions of the Act." The Exchange was also charged with failing to report the various violations alleged by the plaintiffs,

and with failing to direct the entry of liquidating orders for the account of members with net short positions prior to the close of trading even though the Exchange officials knew or should have known that the sellers would not and could not make delivery if the positions remained open.

The complaint in *Incomco* v. *New York Mercantile Exchange* was filed in the District Court for the Southern District of New York on June 16, 1976. This complaint was directed at the long conspirators and the Exchange, "acting separately and also in concert with" the long conspirators, for "blocking the availability of railroad cars, thereby creating an artificial and manipulative railroad car shortage" in violation of the Commodity Exchange Act, and against the Exchange for failing to follow its own regulations requiring it to buy in the cash market for the account of delinquent sellers so that outstanding obligations will be fulfilled. As in *Leist* v. *Simplot,* plaintiffs also included an antitrust charge.

The complaint in *National Super Spuds* v. *New York Mercantile Exchange* was filed in the District Court for the Southern District of New York on May 26, 1976. After consolidation with other actions and amendment, this class action complaint charged that the activities of the short sellers described above "violated the applicable provisions of the Commodity Act [and] acted as a manipulative force which artificially lowered the price of the Contract." Count II charged the short sellers with exceeding position and trading limits set by the CFTC in 17 C.F.R. § 150.10. Count IV was directed against the brokers for the short sellers, charging them

with violating Exchange Rule §§ 44.02[5] by failing to have liquidating orders placed although they knew or should have known that their customers could not deliver potatoes, permitting their customers to exceed position and trading limits imposed by the Act, and failing to report these and other violations of the Act, regulations, and Exchange rules by their customers of which they knew or should have known. Count V generally charged that the brokers, "with knowledge of intent of short Sellers to deflate the price of the Contract acquiesced and/or participated in the acts of Short Sellers." Count VI was directed at the Exchange, charging that it failed and neglected to report and concealed violations of the Act, regulations, and its own rules; failed and neglected to direct that liquidating orders be entered with respect to members which the Exchange knew or should have known would default; generally failed and neglected to perform its duties as a

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5 This reads as follows:

44.02-FINAL DAY OF TRADING

(a) On the final day of trading in the delivery month, it shall be the responsibility of each clearinghouse member who is not in a position to fulfill his contractual obligation on any maturing contract by prescribed notice and tender, to have a liquidating order entered on the Exchange floor not later than five minutes before the time established as the official close for such delivery month. All such orders shall be market orders to be executed prior to the expiration of trading.

(b) On the final day of trading no stop orders will be accepted; no time limit or contingent orders will be accepted, and brokers will not be expected to assume responsibility for the execution of orders placed later than 15 minutes prior to the close of trading.

(c) Cancellations that reach the trading floor after one half (½) hour prior to the time trading is scheduled to cease on the last day of trading in an expiring future may involve extraordinary problems and hence will be accepted solely at the risk of the customer.

contract market; and failed and neglected to exercise due care to halt manipulative practices. The three actions, all claiming extensive compensatory and punitive damages, were consolidated.

After answers had been filed and extensive discovery had been had, one phase of which has occupied the attention of this court, see *National Super Spuds* v. *New York Mercantile Exchange*, 591 F.2d 174 (2 Cir. 1979), three brokers, Clayton, Heinold and Thompson, and the Exchange and Exchange officials moved in the different actions for judgment on the pleadings under Fed. R. Civ. P. 12(c) or, in the alternative, for partial summary judgment under Fed. R. Civ. P. 56(b). Since he believed that all the parties had submitted factual material outside the pleadings, the judge considered the motions under Rule 56(b), although in fact the dispositive reasons so far as concerned the claims under the Commodity Exchange Act, which were all that were raised by the Exchange, the Exchange officials and Thompson, seem to have been wholly ones of law which could have been raised as well when the complaints had been filed two years earlier. In a thoughtful opinion issued on May 29, 1979, 470 F.Supp. 1256, Judge MacMahon held that there was no private right of action for damages under the Commodity Exchange Act, and granted summary judgment in favor of the moving defendants on those counts seeking recovery under that Act.[6] Partial final judgment was entered under Fed. R. Civ. P. 54(b) in favor of the moving defendants, and the plaintiffs took the instant appeal.

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6 For a precise statement of the motions and their disposition, see 470 F.Supp. at 1257 n.1, 1263-64.

III. THE HISTORY OF CONGRESSIONAL REGULATION OF COMMODITY FUTURES TRADING

Although our immediate concern is with the Commodity Exchange Act (CEA) as it now stands, it will be useful at this point to review the long history of Congressional regulation of commodity futures trading.

The first effort at such regulation was the Future Trading Act, 42 Stat. 187 (1921). This established the basic pattern of all regulation to follow, concentrating trading on central exchanges subject to the supervision and control of the federal government. The 1921 act levied a tax on all grain futures contracts not traded on a designated contract market. The Secretary of Agriculture was authorized to designate a board of trade as a "contract market" when the board, *inter alia*, "provides for the prevention of manipulation of prices." § 5(d), 42 Stat. 188. This provision has remained virtually unchanged to the present day, and is one of the provisions upon which plaintiffs seek to base a private right of action against the Exchange. The act also empowered a commission composed of the Secretary of Agriculture, Secretary of Commerce, and the Attorney General to suspend or revoke the designation of any board of trade failing to comply with the conditions of its designation, § 6(a), 42 Stat. 188, and to preclude any person violating the act or attempting to manipulate prices from trading on designated contract markets, § 6(b), 42 Stat. 189. Failure to pay the appropriate tax or keep required records made the violator guilty of a misdemeanor with a fine of up to $10,000 and/or imprisonment for up to one year. § 10, 42 Stat. 191.

The Future Trading Act was declared to be an unconstitutional exercise of the taxing power in *Hill* v. *Wallace*, 259 U.S. 44 (1922). It was redrafted immediately and enacted as the Grain Futures Act, 42 Stat. 998 (1922). The offending tax provision was deleted, and Congress, relying now on the commerce power, simply made it unlawful for any person to deal in futures contracts off a designated contract market, § 4, 42 Stat. 999-1000. The other operative provisions of the 1921 act were retained, with the aforementioned penalties now activated by violation of § 4 rather than the failure to pay a tax. A section on purposes was added, § 3, 42 Stat. 999. This section has been carried over virtually unchanged to the present day, see 7 U.S.C. § 5. The 1922 act was declared a constitutional exercise of the commerce power in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923). The 1921 and 1922 acts established the basic pattern of limiting trading to designated exchanges and regulating that trading by controlling designation of and access to the contract markets. The fine and imprisonment scheme for violations was also established.

Major additions, rather than revisions, were enacted by the Commodity Exchange Act, 49 Stat. 1491 (1936). Coverage was extended beyond grains to include commodities such as cotton, butter, and eggs. Section 4a was added, empowering the commission of the Secretary of Agriculture, Secretary of Commerce, and Attorney General to fix quantitative limits on speculative trading.[7] Here the short conspirators, with the

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[7] This provision currently reads as follows:

(1) Excessive speculation in any commodity under contract of sale of such commodity for future delivery made on or subject to

knowledge of the appellee FCM's, are alleged to have violated limits promulgated pursuant to this section. 17 C.F.R. § 150.10. The 1936 revisions also added § 4b, 49 Stat. 1493, the antifraud provision, essentially in its

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the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.

* * * * *

(2) The Commission shall in such order fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the Commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

present form.[8] New section 4d required the registration of FCM's and section 4e of floor brokers, while section 4g provided for the suspension or revocation of these registrations for violation of the Act or rules adopted thereunder. Section 5a added new duties of reporting for contract markets and some substantive obligations as well. Fines and imprisonment sanctions were extended to cover violations of the newly enacted provisions as well as old § 4, and were also applied to

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8 This provision currently reads as follows:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or exchange of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

anyone attempting to manipulate or manipulating the price of any commodity. 49 Stat. 1501.

By 1936, then, the major provisions which assertedly form the bases of the implied right of action against the FCM's, the trading limit, antifraud, and antimanipulation provisions, were already in place. One of the two additional provisions allegedly affording the basis for an action against the Exchange, § 5(d), had been law since 1921 and the other, § 5a(8), would be added in 1968.

The 1968 amendments, 82 Stat. 26, extended regulation to new commodities such as live cattle and pork bellies. The amendments added § 5a(8), as noted above, requiring a contract market to enforce all of its rules not disapproved by the Secretary of Agriculture.[9] Corresponding § 8a(7) was added empowering the Secretary to disapprove rules which violate or will violate the act or regulations. The penalty provision was altered somewhat, making FCM embezzlement and price manipulation felonies instead of misdemeanors, with a maximum prison term of five years instead of one. 82 Stat. 33-34. Section 6b was added, granting the Secretary the power to issue cease and desist orders against a contract market not enforcing its rules or violating the act. 82 Stat. 31-32.

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9 This provision currently reads as follows:

> (8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of section 5a of this Act; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission.

In contrast to the limited scope of the 1968 amendments, the 1974 amendments, 88 Stat. 1389 (1974), constituted a complete overhaul of the Act. They broadened its coverage from the agricultural commodities with which it had historically been concerned to include "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in", subject to certain exceptions designed primarily to exclude securities. Consistently with this expansion in coverage, enforcement was transferred from the Department of Agriculture to a newly constituted Commodity Futures Trading Commission (CFTC). However, the amendments did not substantially alter any of the provisions which assertedly form the bases of an implied right of action. The antifraud and trading limits sections were basically unchanged. Maximum fines were increased from $10,000 to $100,000 in the penalty section.[10] Section 5(d), requiring a contract

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10 This provision currently reads as follows:

> It shall be a felony punishable by a fine of not more that $500,000 or imprisonment for not more than five years, or both, together, with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or to attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce or knowingly to violate the provisions of section 4, section 4b, section 4c(b) through section 4c(e), section 4h, section 4o(1), or section 19 of this Act, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is

market as a condition of designation, to prevent manipulation and cornering, remained unchanged, and § 5a(8) was altered so that exchanges were required to enforce their rules *approved* by the CFTC rather than those rules not *disapproved* by the Secretary.

The 1974 amendments required contract markets to provide arbitration procedures for settlement of customer grievances and claims not exceeding $15,000, § 5a(11). The CFTC was vested with power to compel exchanges to adopt additional rules, § 8a(7), and to bring actions to enjoin violations of the Act and compel compliance through writs of mandamus, § 6c. Finally, the reparations procedure in § 14 was established, of which more hereafter.

The history of congressional concern with commodity futures trading has thus been one of steady expansion in coverage and strengthening of regulation. In 1936, 1968, and 1974 new commodities came under the CEA. In each of these years the power of the regulatory authority were augmented, and penalties were either extended, increased, or both. The question of Congressional intent with respect to private sanctions under the Act must be considered against this background of increasingly strong regulation designed to insure the existence of fair and orderly markets.

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required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

IV. PRIVATE CAUSES OF ACTION UNDER THE COMMODITY EXCHANGE ACT PRIOR TO THE 1974 AMENDMENT

During the late 1940's, the 1950's, the 1960's and the early 1970's there was widespread, indeed almost general, recognition of implied causes of action for damages under many provisions of the Securities Exchange Act, including not only the antifraud provisions, §§ 10 and 15(c)(1), see *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512, 513-14 (E.D. Pa. 1946); *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2 Cir. 1951) (Frank, J.); *Fratt* v. *Robinson*, 203 F.2d 627, 631-33 (9 Cir. 1953), but many others. These included the provision, § 6(a)(1), requiring securities exchanges to enforce compliance with the Act and any rule or regulation made thereunder, see *Baird* v. *Franklin*, 141 F.2d 238, 239, 240, 244-45 (2 Cir.), *cert. denied*, 323 U.S. 737 (1944),[11] and provisions governing the

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11 While the point is of no great importance as regards this case, we take issue with the statements in the dissent, page 38, that *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2 Cir.), *cert. denied*, 385 U.S. 81 (1966), held that violation of a rule of the New York Stock Exchange could not give rise to an implied cause of action. Our conclusion was that violation of certain types of rules would give rise to an implied cause of action, especially "when the rule imposes an explicit duty unknown to the common law", but that violation of the rule there at issue, requiring brokers to observe "just and equitable principles of trade", did not. *Id.* at 182-83. We likewise do not accept the statement in footnote 8 that "it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange," citing *Jablon* v. *Dean Witter & Co.*, 614 F.2d 677 (9 Cir. 1980). Although the particular rule at issue in *Jablon*, the "know your customer" rule, Rule 405 of the New York Stock Exchange, seems analogous to the rule at issue in *Colonial Realty* and we thus have no quarrel with the result, we do not necessarily accept the broad language of the *Jablon* opinion. In view of our conclusion that plaintiffs have alleged violations of other sections of the Act which give rise to private claims, it is

solicitation of proxies, see *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431-35 (1964). The *Baird* case is of special importance since the claim was of failure of the New York Stock Exchange to perform its duties—a claim paralleling that asserted here against NYME. Writing in 1961, Professor Loss remarked with respect to violations of the antifraud provisions that with one exception "not a single judge has expressed himself to the contrary." 3 Securities Regulation 1763-64. See also Bromberg & Lowenfels, *supra*, § 2.2 (462) (describing 1946-1974 as the "expansion era" in implied causes of action under the securities laws). When damage actions for violation of § 10(b) and Rule 10b-5 reached the Supreme Court, the existence of an implied cause of action was not deemed worthy of extended discussion. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).[12] Implied private

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unnecessary for us now to decide whether such an action would lie for violation of NYME Rule § 44.02.

So far as concerns the dissent's citation of *O'Neill* v. *Maytag*, 339 F.2d 764 (2 Cir. 1964), as a case denying a private right of action in the securities area, that decision rested on the scope of Rule 10b-5 and in no way challenged the proposition that a private cause of action would lie if the facts came within the Rule.

12 Indeed, at the time Congress considered and passed the 1974 amendments to the CEA, the Supreme Court had never rejected a request to imply a cause of action under the federal securities laws. Pitt, *Standing to Sue Under the Williams Act After Chris-Craft*, 34 Bus. Law. 117, 121 (1978).

The suggestion in the dissent that the *Superintendent of Insurance* case was a grudging acquiescence in 25 years of lower court decisions, although finding some support in a footnote to *Cannon*, 404 U.S. at 13 n.9, ignores the language of the opinion in *Superintendent of Insurance* and the climate of the times. The Supreme Court there reversed a decision of this court refusing to apply § 10(b) under circumstances which pressed that section to its absolute limit. The Court quoted not simply in acquiescence but with

causes of action under other statutes administered by the SEC were also widely recognized, see, e.g., *Goldstein* v. *Groesbeck*, 142 F.2d 422, 426-27 (2 Cir.), *cert. denied*, 323 U.S. 737 (1944) (Public Utility Holding Company Act); *Cogan* v. *Johnston*, 162 F.Supp. 907 (S.D.N.Y. 1958); *Schwartz* v. *Bowman*, 156 F.Supp. 361 (S.D.N.Y. 1957), appeal dismissed but holding on this point approved, *Schwartz* v. *Eaton*, 264 F.2d 195, 197-98 & n.5 (2 Cir. 1959); *Brown* v. *Bullock*, 194 F.Supp. 207, 220-21 (S.D.N.Y.), aff'd, with appellant conceding this point, 294 F.2d 415, 418 (2 Cir. 1961)(Investment Company Act);[13] see also *Caplin* v. *Marine Midland Grace Trust Co.*, 439 F.2d 118, 123 n.5 (2 Cir. 1971)(dictum), aff'd 406 U.S. 416, 426 n.17 (1972)(Trust Indenture Act). These statutes contained a

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strong approval the statement in *Shell* v. *Helmsley*, 430 F.2d 819, 827 (5 Cir. 1970):

> When a person who is dealing with a corporation in a securities transaction denies the corporation's directors access to material information known to him, the corporation is disabled from availing itself of an informed judgment on the part of its board regarding the merits of the transaction. In this situation the private right of action recognized under Rule 10b-5 is available as a remedy for the corporate disability.

And all this under a statute which *expressly* created three private actions, §§ 9(e), 16(b) and 18, with respect to various types of securities transactions that were far more efficacious than the reparations procedure of the 1974 amendments to the CEA. See 6 Loss, Securities Regulation at 3689-73 (1969), suggesting that for this and other reasons the *Borak* decision would not necessarily preclude a different ruling with respect to the existence of a private cause of action under § 10(b)—a ruling which never came.

13 Indeed, in several important cases under the Investment Company Act, defendants represented by able counsel did not even think it worthwhile to question the existence of an implied private cause of action. See, e.g., *Rosenfeld* v. *Black*, 445 F.2d 1337 (2 Cir. 1971), *cert. dismissed* 409 U.S. 802 (1972); *Moses* v. *Burgin*, 445 F.2d 369 (1 Cir.), *cert. denied* 404 U.S. 994 (1971); *Fogel* v. *Chestnutt*, 533 F.2d 731 (2 Cir. 1975), *cert. denied*, 429 U.S. 824 (1976).

panoply of other remedies—enforcement by the SEC, suspension, civil fines, criminal penalties, and some express private actions—which, with the exception of the administrative reparations remedy against one type of violator, were every bit as or more extensive than those in the CEA, but arguments that such provisions negated an implied private cause of action were regularly and firmly rejected, see, e.g., Judge Clark's much cited opinion in *Baird* v. *Franklin*, *supra*, 141 F.2d at 244-45; *Goldstein* v. *Groesbeck*, *supra*, 142 F.2d at 426-27; *Fratt* v. *Robinson*, *supra*, 203 F.2d at 632; *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201, 208-09 (6 Cir. 1961). The question here is not whether all these decisions were wrong in the light of Supreme Court opinions of the past four years, as the dissent necessarily implies, but whether the 1974 Congress was not justified in assuming they would be followed with respect to the CEA.

Neither the generality and near unanimity of such interpretations of statutes regulating unfair securities practices, for which the CEA was the analogue with respect to futures trading,[14] nor similar decisions in

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14 While there are differences between the commodities and securities fields, what is relevant to the present question is the common legislative objective of insuring fair dealing for investors on what are important public markets, and the common legislative approach to attaining this objective. The analogy between the two fields has been repeatedly recognized by Congress, see, e.g., S. Rep. No. 93-1131, *supra*, at 19; H. R. Rep. No. 93-975, *supra*, at 39. The 1936 amendments arose from an explicit concern to make protection in the commodities field as strong as it was in the securities field, lest the unscrupulous would simply transfer their operations from one market to another. H. R. Rep. No. 1522, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10446 (June 4, 1934) (Remarks of Chairman Jones of the House Committee on Agriculture); 79 Cong. Rec. 8589 (June 3, 1935) (same). The analogy has been frequently accepted by the courts, see, e.g., *Silverman* v. *CFTC*, 562 F.2d 432, 438 (7 Cir.

other fields, e.g., *Reitmeister v. Reitmeister*, 162 F.2d 691 (2 Cir. 1947)(action for damages implied from statute making interception of telephone calls a crime)(L. Hand, J.); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2 Cir. 1956) (action for damages implied from anti-discrimination provision of Civil Aeronautics Act although express remedies were complaint to CAB and criminal sanctions), were at all novel. They rested on principles recognized in a line of Supreme Court decisions going back to *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). *Rigsby* sustained the right of a switchman to recover damages for violation of the Federal Safety Appliance Acts although the only express sanctions were penal. The Court there stated:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a

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1977) (quoting Moore, J., in *Savage* v. *CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)); *P. J. Taggares Co.* v. *NYME*, 476 F.Supp. 72, 77-78 (S.D.N.Y. 1979) (Weinfeld, J.); by the CFTC, see, e.g., brief *amicus curiae* at 12; and by the commentators, see, e.g., Markham and Meltzer, *Secondary Liability Under the Commodity Exchange Act*, 27 Emory L. J. 1115 (1978); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 821-22 (1975). Congress was not only aware of the implied right of action under the CEA in 1974, as shown below, but surely was also aware of the private right of action recognized in the analogous field of securities regulation.

> remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (Per Holt, C.J., *Anon.*, 6 Mod. 26, 27.) 241 U.S. at 39.

Following *Rigsby* the Supreme Court recognized implied causes of action on numerous occasions, see, e.g., *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967) (sustaining implied cause of action by United States for damages under Rivers and Harbors Act for removing negligently sunk vessel despite express remedies of *in rem* action and criminal penalties); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (sustaining implied cause of action by United States for an injunction under the Rivers and Harbors Act); *Tunstall v. Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (sustaining implied cause of action by union member against union for discrimination among members despite existence of Board of Mediation); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (sustaining implied private cause of action under 42 U.S.C. § 1982); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (sustaining implied private cause of action under § 5 of the Voting Rights Act despite the existence of a complex regulatory scheme and explicit rights of action in the Attorney General); and, of course, the aforementioned decisions under the securities laws. As the Supreme Court itself has recognized, the period of the 1960's and early 1970's was one in which the "Court had consistently found implied remedies." *Cannon v. University of Chicago*, 441 U.S. 677, 698 (1979); *id.* at 718 (Rehnquist, J., concurring) ("Cases such as *J. I.*

Case Co. v. Borak . . . and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task"). See generally Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285 (1963).

Given so many cases implying private rights of action under a broad range of statutes, both cognate (as in the instance of the securities legislation) and otherwise, supported by a goodly number of Supreme Court decisions and the reasoning behind them,[15] it was scarcely surprising that the courts that considered the question prior to the 1974 amendments unanimously upheld the implication of a private cause of action under the CEA. Indeed in the climate then prevailing it would have been almost unthinkable for the lower courts to have held that administrative and penal

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15 Although it is true, as stated in Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. at 735, that "During this same period, the Court frequently turned back private plaintiffs seeking to imply causes of action from federal statutes," 411 U.S. at 735, citing the same cases mentioned in Judge Mansfield's dissent, there can be no doubt that particularly in the closely related field of violations of statutes administered by the SEC, the implied cause of action was so much taken for granted that usually the issue was not even raised. See note 13 *supra*. There are many instances of this under the CEA itself, both before and after the 1974 amendments. See, e.g., *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8 Cir. 1970); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1176 (2 Cir. 1977) ("It is agreed that there is an implied cause of action under the Act for a private remedy."); *Hofmayer v. Dean Witter & Co., Inc.*, 459 F.Supp. 733, 737 (N.D. Cal. 1978). In addition, several courts have begun the process of delineating the precise contours of the private cause of action under the CEA, aided of course by the securities law analogy, assuming either *arguendo* or implicitly that such an action exists. See, e.g., *Miller v. New York Produce Exchange*, 434 U.S. 823 (1977); *Master Commodities, Inc. v. Texas Cattle Management Co.*, 586 F.2d 1352 (10 Cir. 1978); *Moody v. Bache & Co., Inc.*, 570 F.2d 523 (5 Cir. 1978); *P. J. Taggares Co. v. NYME*, *supra*, 476 F.Supp. 72.

remedies were adequate for the enforcement of private claims for economic loss caused by violation of this important effort by Congress to regulate the commodity futures markets. And they did not. The first reported case, frequently cited in later decisions, was *Goodman v. H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967).[16] The unbroken line of decisions upholding a private right of action under pre-1974 law includes cases frm all of the major centers of activity in the commodity futures field. *Anderson v. Francis I. duPont & Co.*, 291 F.Supp. 705, 710 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F.Supp. 417, 437 (N.D. Cal. 1968), modified, 430 F.2d 1202 (9 Cir. 1970); *United Egg Producers v. Bauer International Corp.*, 11 F.Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8 Cir. 1970); *McCurnin v. Kohlmeyer & Co.*, 340 F.Supp. 1338, 1343 (E.D. La. 1972), aff'd, 477 F.2d 113 (5 Cir. 1973); *Gould v. Barnes Brokerage Co., Inc.*, 345 F.Supp. 294, 295 (N.D. Tex. 1972); *Johnson v. Arthur Epsey, Shearson, Hamill & Co.*, 341 F.Supp. 764, 766 (S.D.N.Y. 1972);

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16 The dissent's suggestion, p. 36, that victims of frauds in futures trading had never resorted to the federal courts prior to *Goodman*, which was "the first case to break the barrier", lacks adequate empirical basis. Judge Carter's opinion in the Salad Oil case, *Seligson* v. *New York Produce Exchange*, *supra*, 376 F.Supp. at 1080, rendered in 1974, tells us that this swindle of the early 1960's "led to a string of lawsuits and investigations extending over the past ten years." It is not unlikely that many counsel for defendants confronted with the array of cases under the statutes administered by the SEC, did not think it worthwhile to question the existence of a private cause of action under the CEA—just as their counterparts in well-known cases under the Investment Company Act had failed to do so, see note 13 *supra*.

While we think the dissent's attacks on the reasoning of *Goodman* are exaggerated, this is irrelevant, since the courts followed and extended it without the slightest question, and Congress necessarily regarded these decisions, stretching over seven years, as representing the law.

Arnold v. Bache & Co., 377 F.Supp. 61, 65 (M.D. Pa. 1973); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7 Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (per curiam); *Seligson v. New York Produce Exchange*, 378 F.Supp. 1076, 1084 (S.D.N.Y. 1974), *aff'd sub nom. Miller v. New York Produce Exchange*, 550 F.2d 762 (2 Cir.), *cert. denied*, 434 U.S. 823 (1977).

It is true that most of these cases concerned fraud by a broker against his customers or churning of a customer's account, which was clearly within § 4b of the Act, but none stressed the broker-customer relation as either the basis or the limit of liability. And several did *not* involve fraud practiced by a broker on his customers. The most important of these is *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529 (7 Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 11 (1973). Two cases were before the court. Plaintiffs in the first case sued the Exchange and various members alleging that the defendants manipulated the futures market for frozen pork bellies, a violation of CEA § 9(b), 7 U.S.C. § 13(b), artificially raising the price and thereby injuring those who, like the *Deaktor* plaintiffs, had sold short and were forced to liquidate their positions at higher prices (the converse of the situation of the plaintiffs in our case). The Exchange was also charged with violating CEA § 5a(8), 7 U.S.C. § 7a(8), the provision requiring an exchange to "enforce all bylaws, rules, regulations, and resolutions". Plaintiffs in the second case charged the Exchange with monopolizing trading in the fresh egg futures market, causing the price to fall and forcing plaintiffs to sell at artificially depressed prices. This conduct was alleged to violate the notice and hearing

provisions in Rule 217(D) of the Exchange, CEA §§ 52(8) and 9(b)(the criminal penalty provision for manipulation), 7 U.S.C. §§ 7a(8), 13(b), and the Sherman Act. The case reached the Seventh Circuit on denials of motions by the Exchange and other defendants to stay district court action pending the exercise of primary jurisdiction by the Commodity Exchange Commission. Having declined to defer to the primary jurisdiction of the Commission, the court reached the question whether private damage actions were allowable under the CEA. Citing numerous cases, the *Deaktor* court stated that "courts which have considered the question . . . have apparently uniformly concluded that such an action exists." *Id.* at 534. The court noted that the purpose of the Act was, in the language of the congressional reports, "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." The court further noted that § 9(b) of the Act made it a felony to manipulate prices, and concluded that in light of this provision and the general purpose of the Act, "we think the enactment is at least in part intended to protect the interests of the plaintiffs-traders in these actions," and therefore held that plaintiffs had a cause of action. *Id.* Thus, immediately before consideration of the 1974 amendments began, and only one year prior to their enactment by the Congress, the Court of Appeals with jurisdiction over the center where approximately 80% of all futures contracts were traded in the United States had clearly held that a private cause of action existed under the CEA—not simply for fraud by a

broker on his customer but for manipulation as well. The notion, strongly emphasized by the dissent, that such a decision escaped the knowledge of those framing the amendments, seriously underrates the expertise of our lawmakers and their staffs in subjects of particular concern to them.

Far from undermining the Seventh Circuit's recognition of an implied cause of action, the Supreme Court's reversal, 414 U.S. 113 (1973) (per curiam), on the ground that the court should have deferred to the primary jurisdiction of the Commission implicitly affirmed this recognition. Noting that " 'Congress has established a specialized agency that would determine either that a . . . rule of the Exchange has been violated or that it has been followed . . . ' ", the Court emphasized that " 'Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules . . . ' " and that " 'either determination will be of great help to the . . . court . . . . ' " *Id.* at 115, quoting *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 307 (1973). Thus the Court's reason for insisting on a determination by the Commission "in the first instance", 414 U.S. at 116, was that it would assist a court in hearing plaintiff's claims "in the second instance". The Court did not "decline to reach the issue" whether plaintiffs' claims were cognizable in federal court, as the dissent asserts (p. 40); it simply assumed that they were, as the Seventh Circuit had held.[16a]

Other cases upholding an implied cause of action outside the broker-customer relationship were *United*

16a Mr. Justice Stewart would have affirmed and allowed the action to proceed directly in the district court. 414 U.S. at 416.

Egg Producers v. Bauer International Corp., supra, 311 F.Supp. 1375, which recognized an implied cause of action under § 9(b) on behalf of various egg producers against an import-export firm, and *Seligson v. New York Produce Exchange, supra*, 378 F.Supp. 1076. *Seligson* arose out of the much-publicized "Salad Oil Swindle", and recognized an implied cause of action on behalf of the trustee in bankruptcy of a brokerage firm against the exchange, exchange officials, and the clearinghouse.[17]

While case based on pre-1974 facts decided after the 1974 amendment, apparently under pre-1974 law, are of less pertinence since the 1974 Congress could not have known of the decisions,[18] they deserve mention as

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17 We fail to appreciate the dissent's attempt to distinguish these two cases. With respect to *Egg Producers*, if implied private causes of action did not exist under the Act, there would be no cause of action for an injunction any more than there would be for damages. The *Seligson* decision was rendered before Senate consideration of the 1974 amendments and House repassage in the amended form. Moreover, what the dissent fails adequately to recognize is that the cases under the CEA, numerous and consistent as they are, cannot be taken in isolation but must be considered along with the vast body of law under the securities statutes which set the tone during the late '40's, the '50's, the '60's, and the early '70's, and on which the CEA decisions relied. The efforts to whittle all this away, pages 41-43, are unimpressive. We have already dealt, note 14 *supra*, with the argument as to the cases under Rule 10b-5. The contention that the securities legislation offered less in the way of remedies than the CEA would surprise most students of securities law; with the single exception of the 1974 reparations procedure for certain types of CEA violations, whose inadequacies are described below, they offered more. The argument that the sections of the CEA most heavily relied upon by plaintiffs were enacted before the explosion of the private right of action under the securities laws ignores the fact that the 1974 amendments to the CEA were intended to be a complete overhaul and were effected with vivid Congressional awareness of the decisions implying private causes of action under the CEA as well as the related subject of the laws administered by the SEC.

18 Congress was, however, apparently aware of the pendency of at least one of these cases. See note 30 *infra*.

indicative of the uncontradicted view of the law prevailing when Congress acted. In *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355 (7 Cir. 1975)(Cummings, Stevens, and Tone, JJ.), plaintiff sued the Board and its governors for violating §§ 5a(1) and 5a(8) of the CEA in suspending trading limits on soybean futures. The court began its discussion of liability by stating that "[i]t is undisputed that a private cause of action may be maintained under the Commodity Exchange Act. See *Deaktor* . . . ." *Id.* at 360. In *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7 Cir. 1977), the same court flatly stated that "[p]rivate damage actions are allowable under the CEA. See, e.g., *Deaktor* . . . ." See also *Bartley v. P.G. Commodities Associates, Inc.*, CCH Com. Fut. L. Rep. ¶ 20,123 [1975-77 Transfer Binder] (S.D.N.Y. 1975) (churning complaint under § 4b).

We see no need to burden this opinion with detailed examination of district court decisions concerning whether the 1974 amendments eliminated the private cause of action theretofore unanimously recognized. The courts have divided although the weight of authority is in favor of continued implication.[19] As noted, the only court of appeals to have considered the issue has held that a private cause of action should be implied. *Curran v. Merrill Lynch*, note 1 *supra*.

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19 Cases finding an implied cause of action: *Milani* v. *ContiCommodity Serv., Inc.*, 462 F.Supp. 405 (N.D. Cal. 1976); *Shearson Hayden Stone* v. *Lumber Merchants, Inc.*, 423 F.Supp. 559 (S.D. Fla. 1976); *Bache Halsey Stuart, Inc.* v. *French*, 425 F.Supp. 1231 (D.D.C. 1977); *Kelley* v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977), rev'd on other grounds, Nos. 78-1091, 1092, 5542, 5460 (6 Cir., May 16, 1980); *Hofmayer* v. *Dean Witter & Co.*, 459 F.Supp. 733 (N.D. Cal. 1978); *Berenson* v. *Madda Trading Co.*, CCH Comm. Fut. L. Rep. ¶ 20,689 (D.D.C. 1978); *Gravois* v. *Fairchild, Arabatzis & Smith, Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,706 (E.D. La. 1978); *Rivers* v.

V. THE CONTINUED EXISTENCE OF THE PRIVATE CAUSE OF ACTION

In deciding the issue here before us, we follow the analysis set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[20]

Rosenthal & Co., Civ. Action File No. CV 178-186 (S.D. Ga. 1978), appeal pending, 79-1313 (5 Cir.); *Poplar Grove Planting and Refining Co., Inc.* v. *Bache Halsey Stuart Inc.*, 465 F.Supp. 585 (N.D. La. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F.Supp. 213 (D. Kansas 1979); *R. J. Hereley & Son* v. *Stotler & Co.*, 466 F.Supp. 345 (N.D. Ill. 1979); *Aiken* v. *Lerner*, Civ. Action No. 79-0023 (D.N.J. 1980); *Navigator Group Funds* v. *Shearson Hayden Stone Inc.*, 77 Civ. 5350 (S.D.N.Y. 1980) (Broderick, J.); *Grayson* v. *Conticommodity Services, Inc.*, 48 L.W. 2807 (D.D.C., May 23, 1980); *Witzel* v. *Chartered Systems Corporation of New York, Ltd.*, 48 L.W. 2823 (D. Minn., May 27, 1980).

To the contrary, in addition to Judge MacMahon's opinion in this case, 470 F.Supp. 1256, see *Arkoosh* v. *Dean Witter & Co.*, 415 F.Supp. 535 (D. Neb. 1976), aff'd on other grounds, 571 F.2d 437 (8 Cir. 1978); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F.Supp. 447 (N.D. Ohio 1976); *Bartels* v. *International Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977); *Berman* v. *Bache Halsey Stuart, Shields, Inc.*, 467 F.Supp. 311 (S.D. Ohio 1979); *Alkan* v. *Rosenthal & Co.*, CCH Comm. Fut. L. Rep. ¶ 20,797 (S.D. Ohio 1979); *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979); *Fischer* v. *Rosenthal & Co.*, 481 F.Supp. 53 (N.D. Tex. 1979); *Stone* v. *Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. ¶ 31,100 (N.D. Ill. 1980). The three decisions from district courts in Ohio which declined to find an implied cause of action, *Consolo*, *Berman*, and *Alkan*, are no longer good law in that circuit in light of the Sixth Circuit's contrary decision in *Curran* v. *Merrill Lynch*, cited in note 1 *supra*.

20 This is:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp.* v. *National Assn. of*

There is, however, one differentiating factor of such transcendent importance as to demand mention at the outset. As shown in Part IV of this opinion the decisions prior to the 1974 amendments had uniformly upheld the existence of a private cause of action under the provisions of the Commodity Exchange Act, and as will be shown in this part, the 1974 Congress was well aware of the existing state of the law. Even without more, the question thus would not be whether Congress intended to create a new private right of action in 1974, but rather whether it intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act. Beyond this, however, we do not need to *assume*, as the Court stated would be "appropriate" in upholding a private cause of action in *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979), "that our elected representatives, like other citizens, know the law" or to "presume" that they "were aware of the prior interpretation" of a

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Railroad Passengers, 414 U.S. 453, 458, 460, 38 L. Ed. 2d 646, 94 S. Ct. 690 (1974) (*Amtrak*), *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423, 44 L. Ed. 2d 263, 95 S. Ct. 1733 (1975); *Calhoon* v. *Harvey*, 379 U.S. 134, 13 L. Ed. 2d 190, 85 S. Ct. 292 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 434, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971); *id.* at 400, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (Harlan, J., concurring in judgment).

We read this in light of the later *caveat* in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979) that the basic inquiry is always to plumb the intent of Congress, that the *Cort* factors are simply inquiries helpful in that endeavor, and that satisfaction of one or more of the *Cort* factors will not alone carry the day.

related statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute"). Here the existence of an implied right of action under the Commodity Exchange Act as it stood in 1974 was repeatedly called to the attention of and implicitly approved by Congress. This alone sufficiently answers appellees' claim that if the 1974 Congress wished to create a private cause of action, it would and should have said so and that it is implausible to suppose that "Congress absentmindedly forgot to mention an intended private action." *Cannon, supra*, 441 U.S. at 742 (Powell, J., dissenting). Whether rightly or wrongly in light of recent Supreme Court jurisprudence, the courts had read a private cause of action into the statute, just as they had done with statutes of similar import in related fields, and Congress knew that they had done so. The burden thus lies on those who urge that the 1974 amendments demonstrate an intention to change prior law, or, paraphrasing the language from Mr. Justice Powell's *Cannon* dissent, *supra*, that, in making the changes that it did, Congress "absentmindedly forgot" to repeal the private cause of action. The silence of the 1974 Congress with respect to private causes of action for violations of the CEA, on which the dissent leans so heavily, is no more significant than the similar silence of the 1975 Congress which extensively amended the Securities Exchange Act, 89 Stat. 97. When a principle has become settled through court decisions, there is no occasion for Congress to speak unless it wishes a change.[21]

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[21] We find little force in the dissent's reliance, page 33 and footnote 11, on the failure of the 1968 Congress to enact a section of a bill introduced by Representative Fino providing an explicit right of

1. Taking the first of the *Cort* factors, we have no difficulty in concluding, despite appellees' claims to the contrary, that the plaintiffs were among "the class for whose especial benefit the statute was enacted," a phrase going back to *Texas & Pacific R. Co.* v. *Rigsby*, *supra*, 241 U.S. at 39. Although Congressional committees and sponsors of the ill-fated 1921 legislation devoted most of their eloquence to injuries suffered by producers at the hands of wicked speculators, the Senate Report on the 1922 Act recognized that:

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action against exchanges. Quite apart from the usual problems of relying on actions of an earlier Congress, and much more on its failure to act, see p. 59 *infra*, the question of a private right of action was simply not considered by Congress in the 1968 amendment process. The bill that became the 1968 amendments, H. R. 13094, never contained a private remedy provision, such a remedy was never mentioned in either congressional report, and was never discussed in congressional debate. The dissent's picture of Congress' carefully comparing the bills and deliberately and meaningfully rejecting the provision in Rep. Fino's bill is indeed based on gossamer. Since the failure to act on the provision in 1968 is only of the slightest significance with respect to congressional intent at that time, its bearing on the effort to discern congressional intent six years later, in 1974, is infinitesimally small.

Beyond all this, when Rep Fino introduced his bill with the explicit right of action provision, he included with his speech numerous newspaper articles about the commodities industry. One of these discussed the Great Salad Oil Swindle, and noted that two attorneys for the receiver of Ira Haupt & Co., a brokerage firm which went under in that affair, "are trying to determine whether Haupt can justifiably file suit against the exchange for failure to regulate . . . ." Haupt eventually did, and the court recognized an implied right of action against the exchange, see *Seligson* v. *New York Produce Exchange*, *supra*, 378 F.Supp. 1076. If Congress had given any consideration to Rep. Fino's bill, it could well have failed to enact the explicit remedy provision because it considered this unnecessary in light of the then judicial climate, as had turned out to be the case for Ira Haupt & Co. before the 1974 amendments were passed, see note 17 *supra*. This further illustrates that attempting to attach meaning to the failure of Congress, and even more so of a previous Congress, to enact legislation is a speculative enterprise indeed.

> Transactions in grain futures are utilized by the public for speculation and by the grain trade for the purpose of eliminating or reducing, as far as practicable, the hazards in the merchandising of grain and its products and by-products due to price fluctuations. Public speculation helps to carry the risk for the producers, dealers, and millers who wish to hedge their cash grain transactions. S. Rep. No. 871, 67th Cong., 2d Sess. 3 (1922).

It is true that much of the debate on the floor of the House consisted of vituperative attacks on those "gambling" in the grain trade to the detriment of the producers and the consumer. However, these attacks were generally directed at *big* speculators, i.e., those in a position to manipulate the market, and there was always the recognition that "legitimate trade" was acceptable and indeed beneficial.[22] The emphasis on producers in § 3, the statement of purposes in the 1922 Act, was due to a desire to state a basis clearly within then existing notions of the commerce power rather than to risk invalidation by including classes whom the Supreme Court might not think to come within it; *Wickard* v. *Filburn*, 317 U.S. 111 (1942), then lay twenty years in the future.[23] At that time, moreover,

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22 See, e.g., 62 Cong. Rec. 9404 (June 26, 1922) (Remarks of Chairman Tincher of the House Committee on Agriculture) ("I have never said that the sale of wheat for future delivery should be wiped out . . . but have always said, and I still say, that to let a few gamblers manipulate the grain market was not only unfair to the consumer but unfair to the legitimate trader."); *id.* at 9412 (Remarks of Rep. Voight, a member of the Committee on Agriculture which reported out the bill) ("The bill will reduce gambling but we can not stop it altogether without hurting both consumer and producer").

23 The Court in *Hill* v. *Wallace*, *supra*, had noted that the tax imposed by the 1921 Act applied to sales between members of the

the importance of the speculator in the efficient functioning of the futures market had not yet been so fully recognized by Congress as it has now become.

It is plain in any event that by the time of the 1936 amendments, as was later to be stated in the House Report on the 1978 amendments, "the community protected under federal commodities law was expanded to include speculators." H. R. Rep. No. 95-1181, 95th Cong., 2d Sess. 84 (1978). As described in the 1935 House Report, "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." H. R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935). "Fair practice and honest dealing" are, of course, beneficial not only to farmers but also to legitimate speculators using the market. The concern expressed in the last clause of the quotation, to avoid injury to "the exchanges themselves", certainly encompassed protection for those using the exchanges. This was made clear in a later passage from the same report:

Board of Trade in Chicago. "Looked at in this aspect, and without any limitation of the application of the tax to interstate commerce, or to that which Congress may deem, from evidence before it, to be an obstruction to interstate commerce," the Court could not sustain the Act. 259 U.S. at 68. Congress responded with § 3, precisely focusing on the interstate aspects of futures trading. See 62 Cong. Rec. 9404 (June 26, 1922) (Remarks of Chairman Tincher of the House Committee on Agriculture) ("We have defined interstate commerce, using the language of the Supreme Court, as applying to grains and this law will not apply to any transaction except interstate transactions as defined by the court."); *id.* at 12723 (Sept. 15, 1922) (The Court "called attention to the fact that if grain was in interstate commerce we could reach the situation in this bill; and this bill is strictly following the dictation ... of the Supreme Court ...").

"[The bill] simply provides for honesty in the conduct of what are important public markets. This affects vitally the interests of the people, whether they be producers or consumers of the commodities covered by the bill or whether they belong to that class of citizens who have a fondness, and perhaps some aptitude for speculative investment in commodities and who like to test their judgment concerning values and price trends by occasional and moderate speculation therein." *Id.* at 2-3. While the debates in Congress, like those in 1922, did contain many attacks on speculative investors, again there was a recognition of the necessary role of speculators, and the focus of the attacks was on the big manipulator, whose activity was perceived to be detrimental not only to producers and consumers but also to those referred to as "legitimate" traders and dealers.[24] The clearest indication of Congress' concern

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24 Representative Jones, Chairman of the House Committee on Agriculture, stated that the bill was aimed at eight to sixteen traders on the Chicago Board of Trade "who have been largely responsible for the constant fluctuations in the market . . . ." 78 Cong. Rec. 10446 (June 4, 1934). He later stated that the purpose of the bill was "to check manipulation of markets by certain big traders [who] rig the market to the detriment not only of the producer but also of all others engaged in legitimate transactions in various farm commodities." 79 Cong. Rec. 8589 (June 3, 1935). Another Representative considered the bill to be directed against "the speculators who deal in large quantities," 78 Cong. Rec. 10449 (June 4, 1935) (Remarks of Rep. Gilchrist); a third favored it to counter the activities of "15 or 20 big grain manipulators," and noted it "will not injure but will beneficially affect legitimate dealers," *id.* at 10451 (Remarks of Rep. Sabath). The Senate debates were to the same effect. The bill was designed to clip the wings of the likes of Arthur Cutten, a big grain manipulator whose activities were considered in some detail. See 80 Cong. Rec. 6160 (April 27, 1936) (Remarks of Sen. Pope). Senator Pope specifically recognized the critical role played by the typical speculator:

> it is the small traders—those who take positions in the market of less than 100,000 bushels—that not only absorb the hedging sales but who furnish the real support for future trading in grains. In

to regulate the large-scale market operator is, of course, the authorization of trading limits in § 4a.

The legislative history of the 1968 amendments continued the recognition of the critical role played by speculative investors and the attack on big or powerful manipulators rather than speculators in general. Both the House and Senate reports explicitly recognized that most futures trading was done by speculators. H. R. Rep. No. 743, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 947, 90th Cong., 2d Sess. (1968), reprinted in 2 U.S. Code Cong. & Admin. News 1675 (1968). The House Report noted that such speculative activity carried with it "the danger that on occasion powerful traders will attempt to influence prices," H. R. Rep. No. 743, *supra*, at 2, but also recognized the necessary role of the legitimate speculator: "This speculative activity provides a means of reducing price risks by persons handling the actual commodity and thus makes possible higher prices to producers and lower prices to consumers." *Id.*

Finally, and most important, the concern to protect the speculator as well as the hedger was clearly evident in the enactment of the 1974 amendments. The House Report noted the large influx of speculators into the commodity futures market as one of the "specific situations mandat[ing] a comprehensive rewrite of futures trading regulation". H. R. Rep. No. 93-975, *supra*, at 39. The beneficial, indeed indispensable, role of such speculators was recognized not only in the House Report, in the language quoted in Part I of this opinion, *id.* at 138, but also in the debate on the floor of

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the main their trading is so diffused and scattered that as a body they lend a stabilizing influence. *Id.* at 6164.

the House. Introducing the bill, Chairman Poage of the Committee on Agriculture observed that speculators "provide a very real service to the market and its users, by providing liquidity." 119 Cong. Rec. 41332 (Dec. 13, 1973). Representative Wampler, the ranking minority member of the House Committee and a supporter of the bill, stated that:

> While the speculator has been much maligned to the point where critics of the present marketing system have tried to make "speculator" a dirty word, we must not forget that the speculator performs an important economic function in futures markets. He is, in effect, the risk bearer who assumes the risks which the hedger seeks to avoid. 120 Cong. Rec. 10739 (April 11, 1974).

The debates reveal that one problem prompting the amendments was the catastrophic losses suffered by futures traders, mostly "speculators", who were dealing in commodities not regulated by the old act. See 119 Cong. Rec. 41332 (Dec. 13, 1973) (Remarks of Chairman Poage). In extending regulation to previously unregulated futures markets, the House Report specifically stated that "[t]here is no reason why a person trading in one of the currently unregulated futures markets should not receive the same protection afforded to those trading in the currently regulated markets." H. R. Rep. No. 93-975, *supra*, at 76. In other words, the old act protected those trading in the markets—not merely producers or consumers of the commodity—and the new act would extend this protection of traders to new markets in which even fewer of the traders produced or consumed the actual commodity.

Senate consideration of the 1974 amendments reinforced the views evident in the House. The Senate Report opened with a quotation from Justice Holmes, *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 247-48 (1905), recognizing the virtues of speculation:

> People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. S. Rep. No. 93-1131, *supra*, at iii.

Like the House Report, the Senate Report recognized the role of "the competitive effect of many speculative buyers and sellers in the market" in reducing merchandising price margins. *Id.* at 12. The Senate changed the House bill to provide for an independent CFTC, rather than one under the USDA, since it was concerned that the USDA's historic role as the spokesman for farm interests might affect its policing of commodity markets. See *id.* at 21-22. This clearly evinces a concern to protect those trading on the commodity futures markets, and not simply agricultural producers. Accord, 120 Cong. Rec. 30467 (Sept. 6, 1974) (Remarks of Sen. Taft). Senator Dole considered the purpose of the 1974 amendments to be "to protect any individual who desires to participate in futures market trading," *id.* at 30466, and Chairman Talmadge of the Senate Committee on Agriculture and Forestry wrote that "all of the members of the committee who worked on this legislation had one goal in mind—to develop a strong, but fair regulatory scheme that will protect *investors*,

businessmen and consumers." 120 Cong. Rec. 34996 (Oct. 10, 1974) (emphasis supplied).

It is true, of course, that the CEA was enacted for the benefit of the entire public, as hopefully most regulatory legislation is. But, as is the case with respect to all such legislation, criminal as well as civil, some classes are more in need of protection than others. It is almost self-evident that legislation regulating future trading was for the "especial benefit" of futures traders.[25] Hence it is not surprising that the courts have thus been nearly unanimous in concluding that "speculators", now long recognized to be legitimate investors, as well as hedgers, are within the class for whose especial benefit the CEA was enacted, see especially *Smith* v. *Groover, supra*, 468 F.Supp. at 113; *Gravois* v. *Fairchild, Arabatzis, et al., supra*, CCH Com. Fut. L. Rep. ¶ 20,706. Indeed, even those courts finding no implied right of action under the Act as amended in 1974, including the district court in this case, 470 F.Supp. at 1259, have generally concluded that the first prong of the *Cort* test was satisfied. See, e.g., *Berman* v. *Bache, Halsey, Stuart, Shields, Inc., supra* 467 F.Supp. at 322 ("little question"); cf. *Fischer* v. *Rosenthal & Co., supra* (assuming *arguendo* that plaintiff met the first *Cort* test, "as indeed he may"). More importantly, this court itself is on record to that effect. In *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, supra*, 567 F.2d 1174, where we refused to grant a stay of plaintiff's private damage action and

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25 The securities cases suffice to negate the dissent's suggestion that regulated persons may not also belong to the class for whose special benefit the regulation was enacted. Here Congress made clear that it wished to regulate "bad" speculators for the benefit of good ones, as well as hedgers and simple buyers and sellers.

compel arbitration, the parties having agreed that an implied cause of action existed under the Act, Judge Gurfein wrote that "[w]e have no doubt that the Act itself, *enacted as it was for the protection of investors*, prohibited a surrender of private remedies through an agreement to arbitrate which was not voluntary in the sense that the penalty for refusal was exclusion from the market." *Id.* at 1179 (emphasis supplied).[26] See also *Silverman* v. *CFTC*, 562 F.2d 432, 438 (7 Cir. 1977) ("We must be mindful of a Congressional purpose, clearly evidenced at least since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices") (quoting Moore, J., in *Savage* v. *CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)).[27]

2. We turn now to the second and evidently the most important, see *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575, of the *Cort* factors, "is there any indication of legislative intent, explicit or implicit, either to create such a [private] remedy or to deny one?" 422 U.S. at 78. This inquiry requires an intensive examination of the legislative history of the 1974

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26 While the dissent chooses to characterize this as a "passing reference", it shows the clear understanding of the writer that the Act was enacted to protect speculators and not merely hedgers.

27 The only discordant note on the point that the CEA was intended to protect "speculators" appears to be *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979), a distinct minority view from which the dissent liberally quotes. The commentators have joined the courts' nearly unanimous chorus on this point. See Bromberg & Lowenfels, *supra*, § 462(1) (concluding that "the commodity laws' lack of emphasis on investors is only apparent, not real"); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 826 (1975) ("the statute's clear purpose—to increase existing protection of commodity futures investors").

amendments. We conduct this, of course, with full awareness of the cautions in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976) and *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977), against the dangers of undue reliance on "passing references" by others than the Congressional committees or sponsors or on general statements not directly relevant to the issue at hand.

In our view the legislative history amply demonstrates the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and a desire to preserve them. We are not, as the dissent suggests, "presuming" that Congress was aware of these decisions; the evidence of its awareness is overwhelming.

We begin with the House Report. This noted that when exchange self-regulation first developed, "[V]ery little thought was probably given to whether the failure to meet [stated] ideals would expose the exchanges to legal liability . . . ." H. R. Rep. No. 93-975, *supra*, at 45. The report stated that this view began to change early in the 1920's. "Perhaps the adoption of federal regulatory legislation spurred this total reorientation of the relationship between exchanges and the public. Slowly, the courts began to look upon exchange regulation as a guarantee to the public that its members would not violate its code of conduct." *Id.* In 1968, the report continued, amendments to the CEA required exchanges to enforce their rules, § 5a(8). The existence of private rights of action was thought to have had a perverse effect on the effectiveness of this legislation which the report explicitly noted:

> In the few years this provision has been in the present Commodity Exchange Act, there is grow-

> ing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may have actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants. (emphasis in original).

Later in the Report the Committee noted that one of the specific problems "brought to [its] attention" was the:

> Growing difficulties facing exchanges in self-regulatory actions as a result of *private plaintiffs seeking damages* against the markets. As examples, *exchanges are sued* for actions taken in emergency situations even when the action has been taken at the request (or order) of the CEA. *Id.* at 48 (emphasis supplied).

Nothing in the report, however, indicated dissatisfaction with the private right of action; the objective was to deal with the attendant reduction in exchange rulemaking. This was to be accomplished by empowering the CFTC to require exchanges to adopt rules, § 8a(7).[28]

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[28] The House Report also contained a letter from the Department of Justice to Chairman Poage of the House Committee on Agriculture,

The existence of an implied private right of action was also clearly revealed to Congress in the debate on what became the 1974 amendments. Introducing the bill, Chairman Poage used the language quoted above, which eventually appeared in the House Report, about the change in the legal posture of exchange self-regulation. He then remarked that "when the Commodity Exchange Act was enacted, courts implied a private remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (Dec. 13, 1973).[28a] He went on to note, as would the House report, that as "the judgment of the board of directors of many of the exchanges in implementing decisions under self-regulatory functions is becoming increasingly a justiciable issue," attorneys were advising exchanges to prune out rules they might not be able to enforce in order to avoid the threat of liability in private actions. This threat was described as providing the exchanges with a "solid reason" for retrenching on self-regulatory efforts. *Id.* At the outset of consideration by the whole

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wherein the Department representative twice cited to the recent Supreme Court decision in *Deaktor, supra*, 414 U.S. 113. The letter concerned the interrelation between exchange rules and antitrust law, and the author, discussing the doctrine of primary jurisdiction, referred to "situations where the challenged activity is *alleged to violate the Commodity Exchange Act* as well as antitrust laws". H. R. Rep. No. 93-975, *supra*, at 26 (emphasis supplied). *Deaktor* was cited as a case, obviously brought by a private plaintiff, which alleged violations of the CEA. Any legislator who read this should thus have been aware that private individuals could sue exchanges for violations of the CEA; they had done so in *Deaktor*, and the Supreme Court had merely required an initial resort to the regulatory agency for its views where these would be useful.

28a The dissent chooses to make a point, footnote 16, that Chairman Poage was in error since the first decision implying a private right of action under the CEA was made in 1967 rather than 1966. We fail to see the significance of this.

House, then, the legislators were informed by the Chairman of the Committee considering the bill that private rights of action were implied under the Act.[29] This was not a mere passing reference, but a critical statement of fact that was a necessary step in explaining why new legislation was needed. The 1974 amendments signaled a dramatic shift from the theory of exchange self-regulation to authorization of the CFTC to compel the exchanges to alter or adopt rules, § 8a(7), and the proponents of the amendments were at pains to explain the need for such a shift. This explanation centered on the existence of an implied private right of action. Amendments were required to force exchanges to adopt beneficial rules because the threat of the judicially implied private right of action had led them to shirk this responsibility. Congress could not have understood why it was changing the underlying theory from exchange self-regulation to compulsory regulation without recognizing that the private rights of action that had been judicially implied under the Act demanded this change. It opted to cure the problem that had developed not by abolishing the private right of action but by empowering the CFTC to require the exchanges to adopt appropriate rules. No amount of labored parsing can obscure the self-evident truth that Congress knew the courts were implying private rights of action and did nothing to alter this. It

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29 The point was repeated later by Representative Thone, a member of the Committee on Agriculture. See 120 Cong. Rec. 10748 (April 11, 1974) ("Some observers believe that the provision of the 1968 amendments requiring exchanges to enforce their own rules, *thereby implicitly giving private parties the right to sue for nonenforcement*, has had a perverse effect. To avoid risk of litigation, exchange authorities have been encouraged to reduce rather than strengthen rules designed to insure fair trading").

matters little whether this be called recognition or approval.

The House hearings are replete with references to the maintenance of private causes of action under the Act. A representative of various New York commodity exchanges informed the House Committee on Agriculture that the Chicago Board of Trade was at that very moment the target of a $200 million class action,[30] and urged Congress to "take steps to insure that federally regulated exchanges are not exposed to this sort of astronomical civil liability suits . . .", *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture*, 93d Cong., 1st Sess. 121 (1973), something which Congress did not do. Another exchange representative and FCM, discussing the arbitration procedures to be required of contract markets, told the House Committee that "In addition to these arbitration procedures, complainants *of course* have access to the courts." *Hearings on H. R. 11955 Before the House Committee on Agriculture*, 93d Cong., 2d Sess. 249 (1974) (emphasis supplied). A letter sent in the course of the just-cited hearings from Continental Grain Co. indicates that the cases cited in Part IV of this opinion may well have been only the tip of the iceberg—the cases where the private cause of action was challenged and was sustained in a published opinion. The letter calls to the Committee's attention "one recent class action settlement proceeding in court" which required the mailing of 339,000 legal notices and resulted in legal fee claims of over $2,250,000. *Id.* at 321. The

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30 The reference was apparently to *Case & Co., Inc.* v. *Board of Trade*, *supra*, 523 F.2d 355, see p. 31 *supra*.

letter advocated requiring complainants to choose between arbitration or settlement procedures and resort to courts "which have already held they have jurisdiction over private complaints based on violations of the present law." *Id.*

The existence of a private right of action also was repeatedly indicated during the Senate hearings on the four bills to amend the CEA. *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. (1974). Senator Clark and a commodities law expert, Professor Schotland of Georgetown University, expressed the view that private actions were available under the Act, *id.* at 205, 737, 746. A representative of the Minneapolis Grain Exchange objected to the settlement procedure contemplated for contract markets because the claims which exchanges would be required to adjudicate were not limited by any dollar amount and wished these to be confined to cases where the smallness of the claim entailed an "economic impediment to Court litigation." *Id.* at 415. Such a limit appeared in the bill as enacted, § 5a(11)(ii). The President of the Kansas City Board of Trade urged the Senators to protect exchanges "from unnecessary and costly defenses of lawsuits" brought under the Act. *Id.* at 317. He had made the same request before the House, with similar lack of success. *Hearings on H. R. 11955, supra*, at 123.[31] We shall have more to say about

[31] The dissent relies heavily on a chart introduced during the Senate Hearings, reproduced at footnote 14, to support the conclusion that Congress did not preserve the previously recognized private right of action in 1974. The chart was not prepared by Congress, the relevant Senate Committee, or even a single legislator, but rather by the committee staff. There is no suggestion that in preparing the chart the staff went beyond the explicit provisions of the CEA; the chart

Congress' awareness of the private cause of action and its desire to preserve it when we come to discuss the provision preserving the jurisdiction of the courts. However, what we have developed up to this point is alone sufficient to invoke "the well-recognized canon of construction that the reenactment of a statute incorporates preceding judicial interpretations", *Van Vranken* v. *Helvering*, 115 F.2d 709, 710 (2 Cir. 1940) (L. Hand, J.), *cert. denied*, 313 U.S. 585 (1941)—a canon which, as shown by the *Van Vranken* case, is not limited to interpretations by the Supreme Court. See *Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14 (1930); *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); *Bennett* v. *Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973) (Wyzanski, J.) ("the almost irrebuttable presumption which followed from reenactment with knowledge [of the Fifth Circuit's interpretation of "may" as permissive]"). This canon applies with particular force to the instant case, where the 1974 amendments constituted "the first complete overhaul of the Commodity Exchange Act since its inception," H. R. Rep. No. 93-975, *supra*, at 1, the relevant substantive provisions were left unchanged, and Congress had been made acutely aware of the prior judicial construction that these provisions gave rise to a private cause of action.[32]

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does not purport to deal with the broad subject of civil money "damages", but only with the subject of civil money "penalties". If the chart had attempted to deal with the broader subject of damages, it could have reached only one conclusion, namely, that there was an implied private right of action, since this was the unanimous view of the courts prior to the 1974 amendments.

32 The dissent argues that none of the pre-1974 cases, with the exception of *Deaktor*, was expressly cited to by Congress and that

The Supreme Court has applied this principle on numerous occasions. In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), Justice Marshall, writing for a unanimous Court, said that when Congress has passed a new statute incorporating sections of a previously construed statute, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change"—even though, as indicated above, the interpretations were by lower federal courts and not by the Supreme Court. It was considered significant that the judicial construction of the previous statute had been unanimous, *id.* at 580-81, as was the judicial implication of private rights of action prior to 1974 in our case. In *Georgia* v. *United States*, 411 U.S. 526, 532-33 (1973), the Court was confronted with a question concerning interpretation of the Voting Rights Act, enacted in 1965 and extended after "extensive deliberations" in 1970, with changes and additions in areas other than the section before the Court. The Court had reached a decision on a related question in the 1969 case of *Allen* v. *State Board of Elections*, 393

Congress' failure to mention *Deaktor* is "highly significant" (p. 43). We fail to see why. As we have developed, there is a plethora of evidence that Congress was well aware in 1974 that courts had consistently implied private rights of action under the CEA. This fact was brought out in the House Report, congressional debate, and hearings before both houses, and was crucial to an understanding of specific aspects of the bill. In light of this it is quite irrelevant that specific case names or citations were not mentioned. In all likelihood this was simply because no one particular case was crucial. *Every* pre-1974 case confronting the question had found an implied right of action without limitation in the opinions to the specific relationships at issue—a result foreordained by the history of decisions under the securities laws—and *Deaktor*, which itself had long been foreshadowed by *Baird* v. *Franklin*, *supra*, 141 F.2d 238, decided nearly thirty years before, thus was not a novelty.

U.S. 544 (1969). Justice Stewart reasoned that "[h]ad Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5." 411 U.S. at 533. A footnote to this quotation indicated that the "repeated discussions" were in Congressional hearings. *Id.* n.5. While we have here no Supreme Court decision of the stature of *Allen* construing the CEA, since the Court's opinion in *Deaktor*, 414 U.S. 113, was not an express holding of the existence of a private cause of action under the CEA, *all* the pre-1974 CEA cases, including the Seventh Circuit's decision under review in *Deaktor*, reached the same result in favor of implication, and decisions sustaining private rights of action were called to the attention of Congress not only in Congressional hearings as in *Georgia* v. *United States* but in the House report and in floor debates.

The presumption just referred to is, of course, rebuttable and appellees insist it has been rebutted by changes made in the CEA in 1974. Before taking these up in detail, we note certain circumstances in addition to those already discussed that require an exceedingly strong showing of an intention to abolish the private cause of action for fraud, manipulation and violations by exchanges that had been universally recognized in order to justify a conclusion that this was Congress' intent. The 1974 Congress repeatedly expressed its view that the changes were designed to *strengthen* commodity futures regulation, a goal that would be ill-served by abolishing the private right of action that everyone had thought to exist. The bill that became the

1974 amendments was described on its face as "an act to amend the Commodity Exchange Act *to strengthen the regulation of futures trading* . . . ." H. R. 13113, 93d Cong., 2d Sess. 1 (1974) (emphasis supplied). The original hearings in the House on the bill were called by the Committee on Agriculture "with a view toward strengthening and revising the existing law." H. R. Rep. No. 93-975, *supra*, at 53-54. The remarks on the floor of the House by the Committee chairman and the ranking minority member repeated this theme. See 120 Cong. Rec. 10736 (April 11, 1974) (Remarks of Rep. Poage) ("to strengthen the regulation of futures trading); *id.* at 10739 (Remarks of Rep. Wampler) ("to inform and strengthen the laws"). The goal in the Senate was the same. See, e.g., S. Rep. No. 93-1131, *supra* at 18 (section entitled "Need for Better and Extended Regulation"). See also *Curran* v. *Merrill Lynch, supra*, note 1 at G-8 ("the legislative history of the CFTC Act . . . indicates that Congress intended to extend further protection to the exchange customer, rather than to extinguish existing forms of protection"). Yet the appellees would have us take the forbidden course of ascribing to Congress an intent with respect to private sanctions completely at odds with this clear legislative purpose. See *National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F.2d 672, 690 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (Wright, J.) ("where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers"), and generally Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370 (1947).

In support of this endeavor to rebut the presumption that the 1974 Congress approved the previous interpretation of the CEA, the appellees point to the new reparations procedure of § 14. This authorizes any person complaining of any violation of the Act or any rule, regulation or order by any person registered or required to be so,[33] to apply to the CFTC. If the Commission thinks there are reasonable grounds for investigating the complaint, it shall do so. The Commission may, if in its opinion the facts warrant such action, serve the respondent, who is entitled to a hearing before an Administrative Law Judge except where the amount claimed does not exceed $5,000 in which event the Commission may proceed on the basis of depositions or verified statements of fact. A reparations order is enforceable by suit in a district court. However, this is subject to a right of the respondent to seek a prompt review of the reparations order in a court of appeals.

Quite apart from the provision explicitly preserving judicial remedies which we shall discuss later, the argument that Congress intended this to be the sole private remedy under the CEA is totally unconvincing for several reasons. The first and perhaps the most important reason is the limited scope of the reparations remedy. It is available only against persons who have or should have registered. On appellees' argument, the exchanges which, to the clear knowledge of Congress, had been held subject to private suits before the 1974 amendments, would be wholly relieved of private liability, although Congress failed to heed their

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33 These are FCM's and certain persons associated with a FCM, §§ 4d, 4k; floor brokers, § 4e; and commodity trading advisors and pool operators, § 4m.

repeated pleas for explicitly granting such relief.[34] So too would large unregistered operators, alleged to have committed the most flagrant kind of manipulation, like Simplot and Taggares in the instant case—the very type of persons whose activities had been the subject of particular Congressional concern from the outset. We find it unimaginable that after a half century's devotion to the regulation of futures trading, thirty years of exposure to the liberal implication of private causes of action under the related subject of securities regulation, and knowledge that the courts had consistently applied the same principle to the CEA, the 1974 Congress could have meant that the only federal remedies for persons claiming to have been wronged by such defendants to the extent of millions of dollars should be the small solace of having the Government collect civil fines and enforce administrative or criminal penalties. The dissent cannot paper over this gaping hole by saying, fn. 3, that such operators are not before us. They are defendants, probably the principal defendants, in these actions. While they have understandably chosen to stay in the background in the present argument, acceptance of the dissent's position would compel the district court to dismiss the CEA claims against them. Even with respect to registered persons, the one class of defendants to whom the reparations procedure applies, the remedy hinges upon the Commission's preliminary determination, apparently unreviewable, that the com-

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[34] See *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture*, *supra*, at 121; *Hearings on H. R. 11955 Before the House Committee on Agriculture*, *supra*, at 123; *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry*, *supra*, at 317.

plainant has a *prima facie* case, and there is no assurance that this will afford the procedural benefits available in a civil trial. The case differs fundamentally from instances such as *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers (Amtrak)*, 414 U.S. 453 (1974), and *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. 560, where Congress, operating on a *tabula rasa*, provided a new duty and certain express remedies to enforce that duty, and the Court applied the maxim *expressio unius est exclusio alterius*. When as here Congress adds a new remedy to enforce a preexisting duty, where other remedies had been clearly recognized, it would be expected to say so if it meant the new remedy to be exclusive. In fact, as will be seen, it said the opposite. It is just as much "judicial legislation" for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind.

These conclusions are strengthened by the legislative history of the reparations procedure. Chairman Poage, in an apparent reference to the reparations provisions, noted in the House that the Act "sets up new customer protection features." 120 Cong. Rec. 10737 (April 11, 1974). This language suggests that the "new" features are in addition to the "old" ones, and certainly not that they are exclusive. In the Senate, Chairman Talmadge remarked:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the

> right of final determination by the courts are expressly preserved. 120 Cong. Rec. 30459 (Sept. 9, 1974).

The first sentence strongly suggests that Congress did not intend to repeal private rights of action by enacting the reparations procedure, and the second sentence is not to the contrary. If the reparations procedure was intended to be exclusive, then it *certainly* would lighten the burden on the courts, even with review of reparations orders by the courts of appeals. But the Senator spoke in terms of "hope" and lightening the burden "somewhat"—as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts. The second clause relating to judicial review simply noted that even for those who elected reparations there could still be court involvement. Again the House Report describes the reparations procedures as "intended as a separate remedy designed to supplement the informal 'settlement' procedures contemplated of the contract markets and registered futures associations which are required under other sections of the legislation . . . ." H. R. Rep. No. 93-975, *supra*, at 22. These last two types of settlement procedures, however, are expressly made voluntary by the Act. See §§ 5a(11), 17(b)(10). It can therefore be inferred that the reparations remedy is of the same character, and that the aggrieved trader is in no sense compelled to resort to reparations to obtain relief. Commentators have relied on this reasoning, and the savings clause in § 2(a)(1), in concluding that "the victim of a CEA violation is free to ignore the reparations procedure and file a lawsuit." Bromberg & Lowenfels, *supra*, § 461 at 82.362 (1979). The CFTC is

of the same view. See 41 F.R. 3994 (Jan. 27, 1976); *id.* at 18472 n.5 (May 4, 1976).[35]

The argument that the reparations procedure was intended to be the exclusive private remedy is further

35 The dissent argues, despite all these contrary indications, that the reparations procedure was designed to be the exclusive private remedy beyond informal settlement. In support of this it quotes a letter from Earl Butz, Secretary of Agriculture, published in the House Report, which states that the reparations procedure "should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." The dissent underscores this language, although it is not at all clear what about it suggests that reparations were intended to preclude private actions rather than constitute an additional remedy for aggrieved persons to whom the burden of litigation might be prohibitive. In any event it is irrelevant to our case. The plaintiffs seeking relief before us are not complaining about the handling of their accounts but rather of broad market manipulation. The dissent further stresses a passage from the House Report where it is stated that the Commission "will have original jurisdiction to consider all such complaints" which have not been resolved informally. Again, nothing in this suggests that Commission jurisdiction of reparations proceedings was meant to preclude the jurisdiction of the courts which had been widely recognized. The dissent also relies on the ceiling for civil penalties against exchanges in § 6b of $100,000, arguing that allowing private recovery for "unlimited" damages would be inconsistent with this ceiling. Penalties and damages, however, are quite different in nature. The former are punitive and some limit on the regulator's discretion to impose them is necessary. The latter are remedial and naturally limited to the loss caused by the defendant. Further, the dissent's argument proves too much. There is a limit of $100,000 on the fines which can be imposed on a FCM under § 6(b), but the FCM's are subject to "unlimited" private recovery in reparations. Congress obviously saw no inconsistency between allowing recovery for actual damages and limiting fines. Finally the dissent states that under § 6b fines against exchanges are limited to "an amount which will not 'materially impair the contract markets' ability to carry on its operations and duties.' " P. 47. Rather the CFTC is required to *consider* whether a fine will have this effect; the only ceiling in § 6b is the $100,000 maximum, which, incidentally, is not an "overall" limitation as the dissent states but rather a limit per violation. (For example, each day of failure to comply with a cease and desist order is a separate violation, § 6b). Concern for an FCM's ability to carry on business is specifically required to be considered in § 6(d), yet FCM's are subject to full damages in reparations.

negated and the case for the continuance of the private cause of action is enhanced by the jurisdictional savings clause, § 2(a)(1).[36]

As passed by the House, the exclusive jurisdiction provision read as follows:

> *Provided,* that the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to future delivery . . . *And provided further,* that nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States . . . .

The purpose of this was to separate the functions of the new CFTC from those of the SEC and other regulators. As explained in the House Report, "All commodities trading in futures will be brought within federal regulation under the aegis of the new Commission, however, provision is made for preservation of Securities Exchange Commission jurisdiction in those areas traditionally regulated by it." H. R. Rep. No. 93-975, *supra,* at 3. See generally Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy,* 29 Vand. L. Rev. 1 (1976); Russo & Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission,* 6 Hofstra L. Rev. 57 (1977). The provision was not intended to limit the jurisdiction of

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[36] Plaintiffs do not seek to base their right of action on this jurisdictional provision, but rather point to it as evidencing a congressional concern to preserve existing rights of action. Appellees' criticism, derived from *Touche Ross & Co.* v. *Redington, supra,* 442 U.S. at 577, that plaintiffs' rights must be found in substantive and not jurisdictional provisions, is therefore inapt.

the courts. See *Jones* v. *B. C. Christopher & Co., supra*, 466 F.Supp. at 218-19.

However, there was fear that it would do so and numerous objections were raised to the House provision in the Senate hearings. Admittedly some of these were not primarily concerned with the question of court jurisdiction to hear claims in private actions under the CEA. Chairman Rodino of the House Committee on the Judiciary was concerned that the House provision might be read as pre-empting state courts of their jurisdiction to enforce futures contracts under general commercial law and "to oust even federal courts of jurisdiction". Testifying before the Senate Committee, he suggested an amendment "to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions." *Hearings on S. 2485, S. 2578, S. 2837 and H. R. 13113 Before the Senate Committee on Agriculture and Forestry, supra*, at 259-60. While Chairman Rodino's remarks were focused on antitrust jurisdiction, they were not limited to that. He argued generally that federal courts retained jurisdiction, and cited antitrust jurisdiction as an example supporting this view. Other objections to the exclusive jurisdiction provision of the House bill were explicitly addressed to the preservation of private rights of action.[37] Senator Clark noted that treble damages actions, provided in bills which he and Senator McGovern had introduced,

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[37] See also testimony of Deputy Assistant Attorney General Clearwater of the Antitrust Division, *id.* at 663, to which Chairman Talmadge responded: "I have read your statement in its entirety, and I doubt that this committee, and I doubt the House had in mind depriving either Federal courts or [sic] jurisdiction in antitrust matters, *or any other matter*, and certainly not State courts." *Id.* at 664 (emphasis supplied).

were often the most effective enforcement tools.[38] "Unfortunately, the House bill not only does not authorize them but section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate." *Id.* at 205. Professor Schotland did not refer directly to the exclusive jurisdiction provision, but urged rather that the reparations provision, if retained at all, should be accompanied by "explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there." *Id.* at 737, 747.

The upshot of these various objections was the addition by the Senate of the "savings clause", now in § 2(a)(1):

> nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State. S. Rep. No. 93-1131, *supra*, at 54.

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[38] Defendants and the dissent suggest that the failure to enact these bills is evidence of legislative intent to repeal the private right of action. This suggestion is unpersuasive. None of the bills provided a simple private right of action for actual damages. Rather, two of the proposals, H. R. 11195 and S. 2378, would have expanded the previously judicially recognized right of action by providing for treble damages for any violation; and one bill, S. 2837, provided treble damages for a willful violation and actual damages for nonwillful violations. The dissent's argument that it would have been simple to change the bills so as to eliminate the provision for treble damages ignores that trebling was what the proposers wanted. Simple damages were recoverable under existing law. We have not "ignored" the discussion in the *Amtrak* case, 414 U.S. at 461, as the dissent charges, p. 45, where Congress failed to adopt an amendment that would have altered the interpretation which the Secretary of Transportation had placed on the proposed act. It is simply inapposite.

The purpose of this change was stated to be to "make clear that . . . Federal and State courts retain their jurisdiction." *Id.* at 6. The Conference accepted the Senate amendment, with the same stated purpose. S. Rep. No. 93-1194, 93d Cong., 2d Sess. 35 (1974); H.R. Rep. No. 93-1383, 93d Cong., 2d Sess. 35 (1974). The respective chairmen of the House and Senate committees reported that "the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC." 120 Cong. Rec. 34997 (Oct. 10, 1974) (Senator Talmadge); 120 Cong. Rec. 34737 (Oct. 9, 1974) (Representative Poage). When we couple this with Congress' recognition that jurisdiction over private causes of action had been held to have been conferred, the conclusion that Congress desired their continued recognition is nigh irresistible.

Appellees' primary answer to the foregoing discussion is that the pre-1974 cases upholding a private cause of action under the CEA were wrongly decided under the new trend in Supreme Court jurisprudence with respect to implication and that, in consequence, if Congress desired to preserve such a cause of action the savings clause was insufficient and nothing short of express statement would do. This argument might be somewhat impressive if we were dealing with legislation passed by Congress today. But the law here before us was enacted on October 23, 1974 and "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was." *Brown* v. *G.S.A.*, 425 U.S. 820, 828-29 (1976), quoted

with approval by the majority in *Cannon* v. *University of Chicago, supra,* 441 U.S. at 710-11. Here not only did the 1974 Congress perceive the state of the law as allowing implied causes of action under the CEA but its perception was correct. As already developed, the related area of securities regulation was dominated by *J. I. Case Co.* v. *Borak, supra,* 377 U.S. 426, which was cited with approval, subsequent to the 1974 amendments, in *Cort* v. *Ash, supra,* 422 U.S. at 78, and was distinguished but in no way disapproved in *SIPC* v. *Barbour,* 421 U.S. 412, 423-24 (1975). While we of course follow the most recent pronouncements of the Supreme Court, those pronouncements focus our attention on the question of legislative intent, and "our evaluation of congressional action . . . must take into account its contemporary legal context." *Cannon, supra,* 441 U.S. at 698-99.

The sole decision preceding enactment of the 1974 amendments to which appellees point as evidencing the new trend is the *Amtrak* case, 414 U.S. 453, decided on January 9, 1974. Apart from the fact that *Amtrak* was decided when the amendments were well on the road to enactment and there is no evidence that those concerned with the amendments were aware of it, the decision would not in any event have been a warning flag to Congress to make its approval of a private right of action explicit. The clear language of the Amtrak Act and its legislative history manifested an intent to allow suit only by the Attorney General and affected employees, and not by others such as the plaintiff, a passenger association. The Secretary of Transportation had voiced this interpretation during the hearings and, as Justice Stewart reasoned, "it is surely most unlikely that the members of the Committee would have stood

mute if they had disagreed with it." *Id.* at 460. Here the sponsor of the bill in the House expressed his view, both when introducing the bill and in the House Report, that private actions *were* available under the CEA. It is "most unlikely" that the legislators considering the amendments "would have stood mute if they had disagreed with it."

Finally, Justice Stewart emphasized that allowing private suits would be inconsistent with the legislative purpose of the Amtrak Act, since Congress was deeply concerned with paring rail passenger routes efficiently and without time-consuming proceedings. *Id.* at 458. This would have been reason enough not to imply a private cause of action even under *Borak*, 377 U.S. at 432. See also *SIPC* v. *Barbour*, 421 U.S. 412, 418, 421 (1975) (*Amtrak* viewed as case where proposed right of action was inconsistent with legislative purpose). Here there is little dispute that the purposes of the CEA would be effectuated by private actions.

In light of this it is unnecessary to dwell on just how far the recent triad of *Cannon*, *Redington* and *Transamerica* may have gone in limiting the implied cause of action. We do think, however, that the rumors about the death of the implied cause of action which have been circulating in the wake of these decisions—an attitude strongly reflected in the dissent—are exaggerated, at least as far as previously enacted statutes are concerned, and that the effect of the decisions is simply to emphasize that the ultimate touchstone is congressional intent and not judicial notions of what would constitute wise policy. See *Zeffiro* v. *First Pennsylvania Banking and Trust Company* (3 Cir., May 29, 1980) (No. 79-2259) (injured debenture holder can bring implied cause of action under Trust Indenture Act

against indenture trustee who breaches agreement). Two of the decisions themselves recognized implied actions, *Cannon* under Title IX and *Transamerica* under § 215 of the Investment Advisers Act. *Cannon* is strong support for the result we have reached in this case, since the majority opinion recognized the earlier view on implying rights of action and expressly directed courts to consider Congressional action in light of this legal context. Both *Redington*, which found no implied right of action under § 17(a) of the 1934 Securities Exchange Act, and *Transamerica*, which found no implied action for damages under § 206 of the 1940 Investment Advisers Act, considered statutes which were enacted *prior* to the great explosion in judicial recognition of implied rights. Unlike the congressional action in 1974 involved in this case, or that in 1972 involved in *Cannon*, the congressional actions in 1934 and 1940 under review in *Redington* and *Transamerica* were not taken against a background of widespread judicial recognition of implied private causes of action for damages either as a general matter or with respect to the specific subject matter of those statutes. Further, the legislative history on private rights of action in both *Redington* and *Transamerica* was "entirely silent," 442 U.S. at 571-72; 62 L. Ed. 2d at 153—quite unlike the instant case. *Redington* involved a mere reporting provision, as to which there was no history of the implication of private causes of action and which was "flanked by provisions" expressly according such a right, and *Transamerica* turned largely on the express declaration that certain acts should make contracts void, which was taken to grant a right of rescission but not of damages, and the corresponding history of the jurisdictional clause of the Investment Advisers Act.

Far from foreclosing implication of private rights of action, *Transamerica* explicitly noted that the intent to provide such actions "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* at 154.

Even if we were to accept *arguendo* that the *Cannon-Redington-Transamerica* triad would call for affirmance if they had been rendered before the 1974 amendments to the CEA were enacted, the legislative history demonstrates beyond fair doubt that Congress relied on and approved the unanimous course of decisions recognizing private causes of action under the CEA, which in turn, were solidly based on the Supreme Court's decision in *Borak*. Even if that decision were now to be regarded as an aberration, see *Cannon, supra*, 441 U.S. at 735-36 (Powell, J., dissenting); *Redington, supra*, 442 U.S. at 576-77, this affords no basis for thinking that the 1974 Congress had any idea there would be such a drastic change in the Court's thinking.

Appellees also argue that the statutory provisions at issue cannot support a private cause of action because they merely proscribe certain conduct or prescribe duties, rather than explicitly creating rights (§§ 4a, 4b, 5(d), 5a(8)). It is true that the form in which Congress casts a statutory provision may serve as some indicator of the propriety of implication, see *Cannon, supra*, 441 U.S. at 690 n.13; *Transamerica, supra*, 62 L. Ed. 2d at 154, but this is by no means determinative. When, as here, the legislative history and the "circumstances of [a statute's] enactment" evince a clear intent to preserve a private cause of action, the form in which this intent is expressed cannot be permitted to become an obstacle to its realization. The cases do not purport to establish a linguistic test for implication and, in any event, the

securities cases are an exception to the right/duty dichotomy. *Cannon, supra,* 441 U.S. at 690-92 n.13. Even if Congress were aware of the perceived significance of this dichotomy in 1974, which it was not, there would have been no reason for it to suppose that the CEA would not fall under this same exception.

The same considerations refute the claim that a criminal provision such as § 9(b) cannot support a private cause of action. Prior to 1974 courts had implied a cause of action under this provision, see, e.g., *Deaktor, supra,* 479 F.2d at 534, and the Supreme Court had implied such actions from other penal provisions, see, e.g., *Borak, supra.* There was no reason for Congress in 1974 to suppose that this would not continue. In *Cort* v. *Ash, supra,* decided after passage of the 1974 amendments, Justice Brennan declined to imply a private cause of action in favor of a shareholder suing derivatively from a criminal statute prohibiting corporations from making certain specified political contributions. He was careful to note, however, that "provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages," and he refused to "go so far as to say that . . . a bare criminal statute can *never* be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group." 422 U.S. at 79-80 (emphasis in original). He rested the decision on the basis that "the intent to protect corporate shareholders particularly was at best a subsidiary purpose of § 610, and the other relevant factors are all either not helpful or militate against implying a private cause of action." *Id.* In the case of the CEA we have found abundant evidence in the legislative history that the intent to protect traders in

commodity futures was the dominant purpose and the other relevant factors also militate in favor of implying the cause of action. Moreover, the CEA cannot be characterized as a "bare criminal statute". It is replete with civil remedies which involve the courts either directly or on review of CFTC action. See, e.g., § 6(b) (civil fines for, *inter alia*, manipulation); § 6b (cease and desist orders); § 6d (state actions for damages on behalf of residents); § 5b (suspension or revocation of contract market designation); § 14 (reparations). This is not at all a case where a court should be held back from implying a private cause of action because of a legitimate fear that Congress intended only criminal sanctions to apply to certain prohibited conduct.

As previously noted, see note 38, *supra*, appellees and the dissent also argue that no right of action should be implied because Congress did not enact proposals containing explicit rights of action which were before it. Indeed, the dissent repeatedly refers to one house or another of Congress having "rejected" amendments, when it merely failed to act upon them. The effect of such a failure is quite different from the voting down of an amendment, something that the word "rejection" inevitably calls to mind. A house of Congress may have failed to act on an amendment for any number of reasons other than opposition to it—belief that the point was already covered by existing law, see *Diamond Crystal Salt Co.* v. *P. J. Ritter Co.*, 419 F.2d 147, 148 (1 Cir. 1969); *Burlington Truck Lines* v. *Iowa Employment Security Comm'n*, 32 N.W.2d 792, 797 (Iowa 1949); objection to the particular terms and inertia in the way of correction, see note 38 *supra*; or just plain loss in the legislative shuffle. The language of *United States* v. *United Mine Workers*, 330 U.S. 258,

283 (1947), with regard to the failure of the House to enact a bill specifically providing for the injunctive relief there sought by the United States is peculiarly apt—"the fact that the House version did not provide for the issuance of injunctions to aid in the operation of seized plants is not the issue here. Rather it is whether the House expressed any intent to restrict the existing authority of the courts." See also *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 n.11 (1969) (". . . unsuccessful attempts at legislation are not the best guides to legislative intent").[39]

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39 We find little relevance in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), on which the dissent heavily relies. There Congress had deliberately withheld from the I.C.C. the power to award reparations for past unreasonable motor carrier rates, in sharp contrast to what it had done with regard to rail and water rates. The issue was whether a shipper could circumvent the congressional policy by suit in the courts, although the *Abilene* doctrine, 204 U.S. 426 (1907), would require the courts to refer the issue of reasonableness to the Commission. The Court concluded, although by the narrowest margin, that "It would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I.C.C. to litigate what would ordinarily be the sole controversial issue in the suit", 359 U.S. at 474—although some commission cases and two district court cases which had given only "cursory attention" to the problem had held this might be done. Unlike the 1974 amendments to the CEA, there had been no comprehensive revision of the Motor Carrier Act after consistent judicial interpretation that it did permit reparations suits. The only communication of the Commission's views to Congress was in connection with a request that *it* be given reparations authority, on which Congress had not acted. In our case Congress deliberately left in place a series of eleven thoroughly considered decisions, in line with Supreme Court decisions in a closely related field, stretching out over seven years. Moreover, on the very point that concerned the Supreme Court in *T.I.M.E., Inc.*, namely, that the *Abilene* doctrine would involve the agency in an area where Congress had denied it power and thus circumvent congressional policy, there is no such conflict here. Indeed, the Supreme Court had ruled in *Deaktor* before the 1974 amendments were enacted that in a suit on

Although the Supreme Court has very recently warned in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 48 L.W. 4658, 4662 (1980), quoting from *United States* v. *Price*, 361 U.S. 304, 313 (1960), which, in turn, was quoted in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963), that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," see also the discussion at 48 L.W. 4662 n.13, NYME, the opinion below and the dissent rely heavily on a 1978 amendment adding § 6d, which authorizes state officials to bring suits in federal courts to enjoin violations of the Act and to obtain monetary redress for their residents against violators other than exchanges. NYME asserts that the exception demonstrates a congressional desire that no private actions should exist against exchanges; the dissent takes broader grounds.

In fact, the evolution of § 6d actually supports rather than undermines the implication of a private cause of action against the exchanges. Section 6d was added during the reauthorization of the CFTC pursuant to the sunset provision in the 1974 amendments, 88 Stat. 1391. The period between 1974 and 1978 had seen the rise of widespread fraud off the regulated and supervised contract markets, particularly in the form of commodity options and leverage contracts. The CFTC was severely criticized for its failure to protect investors in this area, and the states were eager to take matters into their own hands and protect their residents. See generally Lower, *State Enforcement of*

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an implied cause of action under the CEA, the court should stay the action pending resort to the agency if this seemed desirable to preserve uniformity.

the Commodity Exchange Act, 27 Emory L. J. 1057 (1978); Young, *A Test of Federal Sunset: Congressional Reauthorization of the CFTC*, 27 Emory L. J. 853 (1978). Some had, see, e.g., *Kelley* v. *Carr*, *supra*, 442 F.Supp. 346 (W.D. Mich. 1977), but others were hamstrung by perceived limitations in the *parens patriae* doctrine. H. R. Rep. No. 95-1181, *supra*, at 14. The addition of § 6d was designed to remove these doubts and to enlist the prosecutorial and enforcement tools of the states to aid the CFTC in correcting abuses primarily off the contract markets. See *id.* at 15 (§ 6d "is intended, among other things, to provide the several states with the power . . . to protect their citizens from persons, such as London options firms, vendors of dealer options and merchants of so-called leverage contracts who perpetuate fraudulent and other practices made unlawful by the Federal law"). See also *Luna* v. *Merrill Lynch*, *supra*, note 1 at 6-8 n.24. Since this concern was largely with off-market abuses, contract markets, clearinghouses, and floor brokers were exempted from the coverage of § 6d. See S. Rep. No. 95-850, 95th Cong., 2d Sess. 25-26 (1978) (activities of these persons "generally of the character of 'pit trading' rather than customer contact"); 124 Cong. Rec. S10561 (July 12, 1978) (Remarks of Sen. Bellmon).

Indeed, the legislative history indicates that the perceived existence of an implied private cause of action against exchanges was actually one of the reasons for their exemption from § 6d. Explaining the exemption, Senator Leahy of the responsible committee noted that:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission

> regulation, institution of Commission enforcement proceedings, and *the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the Commodity Exchange Act.* 124 Cong. Rec. S16527 (Sept. 28, 1978) (emphasis supplied).

Since Congress explicitly relied on judicially implied rights of action in fashioning the exemption in § 6d, that exemption can hardly be cited as evidence of a desire to insulate exchanges from such actions. See also *Smith* v. *Groover, supra,* 468 F.Supp. at 117 ("We fail to see how an apparent congressional unwillingness to *extend* the liability of contract markets suggests an intention to *abolish* such liability altogether").[40]

This analysis is enough to answer NYME's major contention, namely, that the exemption of contract markets from the *parens patriae* actions newly authorized in 1978 is evidence that Congress did not mean them to be subject to private actions of any sort. The dissent adds two broader arguments. The first is that the 1978 amendment offered Congress an

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40 Requiring states to proceed in federal court and to notify the FCTC does not demonstrate that the 1978 Congress intended to eliminate the private suit for damages which had been recognized by its predecessors four years previously. The states were expected to act largely in an enforcement role, much as did the FCTC; moreover it would be incongruous to allow a state to proceed as *parens patriae* in its own courts for a violation of federal law. Sufficient means to obtain uniformity in private litigation were afforded by the controlling effect of federal law in all CEA litigation and the possibility of referral to the CFTC approved by the Supreme Court in *Deaktor.* Beyond this the dissent's reliance on such a slender reed as the inference to be drawn from the 1978 Congress' having required *parens patriae* suits to be brought in federal courts with prior notice to the CFTC is a prime example of the unreliability—frequently noted by the Supreme Court—of relying on the thinking of a later Congress as a guide to the intentions of a former one.

opportunity expressly to affirm the private right of action in the face of a few district court decisions that this no longer existed in the light of the 1974 legislation and what the dissent calls "the Supreme Court's recent but well-publicized adoption of somewhat stricter principles governing the implication of private causes of action." There are several answers. The first is that in 1978 Congress was concentrating on *parens patriae* suits; it was not considering a general revision of the CEA. "The logic of defendants' argument would be to require federal courts to prohibit private actions with respect to any statute amended in any way after the mid-1970's if Congress did not explicitly create a private right of action." *Navigator Group Funds, supra,* at 16. The second is that while Senator Huddleston cited two district court decisions which had denied a private right of action under the 1974 amendments, these were regarded as "unfortunate" and contrary to the many others he listed that had recognized the continued existence of such actions. 124 Cong. Rec. S. 10537 (July 12, 1978). Indeed the Senator expected additional causes of action to be recognized under other provisions of the CEA in the future, a view that hardly comports with fear of a new restrictive trend in implication jurisprudence. The third is that the asserted new trend in Supreme Court decisions had not yet begun, let alone been "well-publicized". *Cort,* which cited with approval both *Rigsby* and *Borak,* 422 U.S. at 78, merely disallowed a private cause of action in the case *sub judice.* It did not indicate any new trend, and the courts have not so regarded it. As Mr. Justice Powell noted in his *Cannon* dissent of 1979, 441 U.S. at 741, "In the four years since we decided *Cort,* no less than 20 decisions by the Courts of Appeals have

implied private actions from federal statutes." *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977), paid respectful attention to *Borak*, *supra*, 377 U.S. 426, as *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975) had also done, and to *Superintendent of Insurance*, *supra*, 404 U.S. 6. The issue decided adversely to the plaintiffs in these cases was not whether an implied cause of action existed generally but whether the particular plaintiffs came within the protected class. The other cases cited are even less to the point. The first indication of a changed attitude that could be detected by anyone reading the Court's opinions without an exceedingly high powered magnifying glass, not possessed even by the courts of appeals, much less by the Congress, was the 1979 opinion in *Cannon*—and there not in the decision, which was favorable to the plaintiff, but in footnote 6 to Mr. Justice Stevens' opinion, and especially in the dissenting opinion of Mr. Justice Powell.

The dissent argues finally that the express conferring of a right of action upon the states in 1978 shows that Congress thought such action to be necessary before any private cause of action could exist. The assertion is belied by the very passage from the House Report from which the dissent quotes. There was no history of recognition of causes of action by the states on behalf of their residents; indeed the very existence of *parens patriae* actions for other than a state's own financial loss had been called into most serious question by *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 151 (1972). The fact that only express legislation could overcome that decision does not at all suggest that Congress meant to destroy an implied cause of action by victims of proscribed practices which the courts had

upheld since 1967 and Congress had recognized in 1974.[41]

3. Our answer to the second question posed by *Cort* largely determines that to the third, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" Indeed, the question need hardly be asked in a case where, as we have found here, there is abundant evidence that Congress affirmatively intended the private remedy to continue. If Congress clearly thought the remedy to be consistent, it would be of no moment that a court should have doubts about this. Moreover, we have been pointed to nothing that would show how maintenance of suits such as these can impede the functioning of the CEA. If questions should arise in which a court would be aided by consideration by the CFTC, the procedure of a stay pending Commission consideration, which the Court directed in *Deaktor, supra,* 414 U.S. at 115, is available. The Commission sees no inconsistency. To the contrary, it tells us in its *amicus* brief (p. 15) that:

> private damage suits under the Act are consistent and may coexist with the forums expressly provided by Congress for the adjudication of complaints of futures traders—Commission reparation proceedings and contract market arbitration proceedings. The Commission has carefully harmonized these three rights that, in its view, have

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41 The list of CEA protections in the 1978 Senate Report, S. R. No. 95-980, *supra,* at 12-13, which the dissent, note 25, sees as indicative of a congressional belief that no private right of action existed, included only those protections *expressly* provided by the CEA, and is not at all inconsistent with the view, clearly held by the 1974 Congress, that other judicially *implied* protections existed. See *Navigator Group Funds, supra,* at 14-15.

> offered a commodity trader an election of remedies since 1974. (footnotes omitted).

The Commission also notes that it "is an agency with limited resources which are insufficient to permit it to police all commodity-related transactions" (p. 34), and that the private damage remedy, in the words of *Cannon*, "is necessary or at least helpful to the accomplishment of the statutory purpose," 441 U.S. at 703. Such expressions by the agency charged with the administration of the statute are entitled to substantial weight. *Cannon, supra,* 441 U.S. 706-08 & n.42.

4. Fortunately, little space needs to be devoted to the fourth *Cort* factor, "is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?", 422 U.S. at 78. The answer is clearly in the negative. The federal government has been vitally concerned with trading in futures since 1922; indeed, the courts have held that § 2(a)(1) of the CEA preempts the application of state law. See *International Trading, Ltd.* v. *Bell,* 262 Ark. 244, 566 S.W.2d 420 (1977); Bromberg & Lowenfels, *supra,* at § 4.6 (471); Johnson, *supra.*

Having answered the first and third *Cort* questions in the affirmative and the fourth in the negative, and having found as to the second that there is ample evidence of legislative intent to preserve a private remedy, we conclude, in accordance with the Sixth Circuit's decision in *Curran* v. *Merrill Lynch,* see note 7 *supra,* that the district court was in error in holding that no private cause of action in damages for violation

of the CEA existed. Since the district court struck all the claims under the CEA, we need not now consider which claims, if any, were within the antifraud provision, § 4b, as distinguished from the antimanipulation provision, § 9(b), relied on as to all defendants; § 4a, relied on as to the conspirators and their brokers; and §§ 5(d) and 5a(8), relied on as to the NYME. Although the other provisions are fairly straightforward and clearly cover the activities alleged in the complaint, § 4b, to put it mildly, is not an easy provision to construe. Commentators have said of it that "While the intent to outlaw fraud is clear from the (A)-(C) subparagraphs, the syntactical mess which precedes them makes it difficult to answer some basic questions about coverage." Bromberg & Lowenfels, *supra*, § 452, at 82.286. Appellees are wrong in saying that § 4b by its terms only prohibits "any person" from defrauding "any other person" in connection with the making of a futures contract for or on behalf of that other person. Thus, if A defrauds broker B, who was making a futures contract for C, A would have defrauded C in connection with a futures contract made for C, although C is not A's customer.[42] The applicability of § 4b may well extend even further, since it could be argued that one trading for his own account makes a contract "for" himself, thus bringing fraud between two principals within the confused language of § 4b. The legislative history of the

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42 The plaintiffs in the consolidated actions before us include both persons who traded through agents, who would be within this example, and persons who traded directly for their own account. See *National Super Spuds, Inc.* v. *NYME*, 77 F.R.D. 361, 370 (S.D.N.Y. 1977). It is not clear in every case, however, which plaintiffs fall within which group.

provision contains some statements which indicate an intent to protect "customers", see H. R. Rep. No. 1522, 73d Cong., 2d Sess. 5 (1934), although this is never suggested as the limit of coverage, and other statements which suggest a broad construction, see H. R. Rep. No. 1551, 72d Cong., 1st Sess. 1 (1932); 80 Cong. Rec. 6162 (April 27, 1936) (Remarks of Sen. Pope); *id.* at 7853 (May 25, 1936); H. R. Rep. No. 743, 90th Cong., 1st Sess. 3 (1967); S. Rep. No. 947, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 1673, 1678 (1968). When clarification of the section was suggested in 1974, Senator Clark read § 4b as an example of archaic language, but took it as "simply try[ing] to convey the idea that it is unlawful for any person to cheat or defraud another person." *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry, supra,* at 687 (Sen. Clark). Senator Clark was echoing the views of a predecessor considering the section when it was proposed: "[T]he object of the legislation is, or should be, to prevent deceptive or fraudulent transactions. Any language which accomplished that end is worthy of consideration." 80 Cong. Rec. 7871 (May 25, 1936) (Remarks of Sen. Robinson). None of the cases recognizing an implied right of action under § 4b suggest limitation to the broker-customer relation. Their reasoning is broader, and they frequently cite non-§ 4b cases such as *Deaktor.* In *Hirk* v. *Agri-Research Council, Inc., supra,* 561 F.2d at 104, the court suggested that, in line with *Superintendent of Insurance* v. *Bankers Life & Casualty Co., supra,* 404 U.S. at 12, the language of § 4b must be read "flexibly, not technically and restrictively." The dissent is thus seriously mistaken in assuming that § 4b will necessar-

ily be limited to cases coming within its crabbed language. We deem it inadvisable to rule on the applicability of § 4b without the benefit of evidence of the exact relations among the various parties; indeed plaintiffs may find it unnecessary to rely on this section. It is enough for present purposes that the CEA counts stricken from the complaints clearly charged a gross violation of the prohibition of manipulation, § 9(b), of the very type against which Congress had been legislating for half a century.

The order of the District Court is reversed.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that the Commodity Exchange Act (Act), when analyzed according to well-settled principles of construction established by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975); *Cannon v. University of Chicago*, 441 U.S. 667 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S. Ct. 242 (1979), fails completely to reveal any Congressional intent to approve, much less create, an implied private right of action in favor of these plaintiffs-appellants (1) against futures commission merchants and brokers (such as defendants Heinold Commodities Inc., Thompson & McKinnon, Auchincloss, Kohlmeyer Inc., and Clayton Brokerage Co. of St. Louis, Inc.), or (2) against contract exchanges (such as the New York Mercantile Exchange and its officers). On the contrary, Congress expressly provided a pervasive panoply of judicial and administrative means for enforcing compliance with the Act, including civil fines,

compensatory reparations, arbitration, cease and desist orders, and criminal penalties, which may reasonably be viewed as exclusive.

None of the sections of the Act relied upon by appellants (such as §§ 4b, 9(b), 5(d), 5a(8) of the Act, 7 U.S.C. §§ 6b, 13(b), 7(d), 7a(8)) contain any language even remotely suggesting that they were enacted for the "especial" benefit of a particular class of which plaintiffs are members, a primary factor to be considered in determining Congress' intent. *Cort v. Ash, supra,* 422 U.S. at 78. On the contrary, § 4b, of the Act, 7 U.S.C. § 6b, the anti-fraud provision heavily relied on by plaintiffs as supporting their claims against the broker defendants, indicates that it was enacted for the benefit of a discrete class of which plaintiffs are *not* members, namely, customers claiming fraud against brokers with whom they have a broker-customer relationship. Section 9(b) of the Act, 7 U.S.C. § 13(b), a criminal statute also relied on by plaintiffs, reveals that it was enacted for the benefit of the general public, which is insufficient to meet the requirement that a statute creating an implied remedy be for the benefit of a "special class." Section 5 of the Act, upon which plaintiffs rely as the basis for their claim against the New York Mercantile Exchange, is essentially a licensing statute which, among other things, obligates contract markets to comply with certain requirements, including the prevention of price manipulation. It neither grants private rights to members of any class, identifiable or otherwise, nor proscribes any conduct as unlawful.

The legislative history of the Act, which runs into hundreds of pages of Committee reports, testimony and debates, fails to contain one word approving a private

right of action, despite reference by a couple of witnesses and a senator to the subject. On the contrary, in 1974 Congress failed, after exhaustive hearings, to enact any one of several bills which would have expressly provided a private right of action for violations of the Act, S. 2837, 93d Cong., 2d Sess. § 505(a) (1974) (Hart bill) and S. 2378, § 16 (McGovern bill). In 1968 Congress had rejected a bill which would have made *contract markets* liable to aggrieved persons for violations of the Act, H.R. 9178, 90th Cong., 1st Sess. § 32 (1967). Moreover, the enactment of a reparations procedure whereby any person injured by a violation of the Act can recover compensatory damages, § 14, and its legislative history, shows not only that "Congress knew how to confer a private right of action when it wished to do so," *Transamerica, supra,* 100 S. Ct. at 248 n.13, but that Congress viewed the reparations procedure, along with the other expressly provided remedies, as sufficient to protect those aggrieved by violations of the Act. H.R. Rep. No. 975, 93d Cong., 2d Sess. 22, 83 (1974). In this respect the Act differs sharply from the Securities Exchange Act of 1934, 78 U.S.C. §§ 78, *et seq.*, relied upon by the majority, which does not provide for any administrative proceeding to recover damages.

Faced with this persuasive evidence against any intent to create or approve a private right of action, the majority relies on the fact that prior to the 1974 revision of the Act various lower federal courts, using the now-outmoded "tort theory" for implying a private right, had implied such rights under the Act as it then existed and contends that against this background (of which Congress is presumed by the majority to be aware) congressional silence in 1974 must be inter-

preted as congressional approval. I disagree. Congress is not under any duty to state that the various remedies provided by it are exclusive, much less to disavow or disassociate itself from prior lower court decisions as if they were statutes enacted by it. *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1958). The Supreme Court had never found implied rights under the Act. Virtually all of the lower federal court decisions, moreover, are irrelevant for the reason that they deal with rights of *customers* against their broker-dealers under § 4b, 7 U.S.C. § 6b, not suits by speculators such as plaintiffs against brokers with whom they have no relationship.

Only one pre-1974 decision, *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *reversed on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), decided less than one year before the 1974 revision of the Act, implied a private right in favor of a trader against an exchange. Neither this nor any other of the pre-1974 decisions relied on by the majority was ever cited to or discussed by Congress.[1] To presume under these circumstances that Congress was aware of and approved these prior cases is to substitute sheer speculation for hard evidence of intent.

In addition the majority errs in my view by presuming that Congress assumed that a private right

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1 Although the Department of Justice in a letter to the House Committee, dated January 30, 1974, H.R. Rep. 93-975, *supra*, at 25, 26, briefly cited the Supreme Court's decision in *Deaktor*, the Department cited the case not for the proposition that private rights of action exist under the Act—indeed the Supreme Court's decision did not even address private rights of action—but rather for the totally different purpose of persuading Congress not to enact a blanket antitrust exemption for the exchanges. There is nothing in the legislative history suggesting that Congress was aware that the lower court in *Deaktor* had implied a private right of action under the Act.

may be implied in the absence of a Congressional statement of the opposite intent. On the contrary, the burden is on appellants to show an affirmative Congressional intent to favor an implied private right. Lacking any affirmative evidence of such approval, either on the face of the Act or in its legislative history, plaintiffs have failed to sustain that burden.

PRINCIPLES OF STATUTORY CONSTRUCTION TO BE APPLIED IN DETERMINING WHETHER IMPLIED PRIVATE RIGHT OF ACTION EXISTS

As the Supreme Court has recently made clear, *Transamerica, supra,* 100 S. Ct. at 245; *Redington, supra,* 442 U.S. at 568; *Cannon, supra,* 441 U.S. at 688, the question of whether a statute impliedly creates a private right of action is one of statutory construction requiring us to determine whether the plaintiff has sustained the burden of showing that Congress had an unexpressed intent in favor of such a remedy. See *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 419 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974) (hereinafter *Amtrak*); *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 182 (1966), *cert. denied,* 385 U.S. 317 (1966) (Friendly, C.J.). Absent evidence of clear intent, judicial creation of a private remedy amounts to an assumption or usurpation of the legislative function in violation of the separation of powers doctrine. *Cannon, supra,* 441 U.S. 743-47 (Powell, J., dissenting).

In construing a statute to ascertain Congress' intent "the court is to apply the law in effect at the time it renders its decision, unless doing so would result in

manifest injustice or there is statutory direction or legislative history to the contrary," *Cort v. Ash, supra,* 422 U.S. at 77 (quoting from *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974)). Although the utility of a private remedy in achieving the apparent goal of legislation is a factor to be considered in seeking to divine Congress' intent and was at one time the dominant factor, e.g., *J.I. Case Co. v. Borak,* 377 U.S. 426, 436 (1964), it has been relegated to a lesser position by a series of decisions beginning with *Cort v. Ash, supra.* We are now instructed to look principally to the language and structure of the statute at issue in light of the circumstances surrounding its enactment rather than engage in judicial legislation supported only by our own view that a private suit would be a salutary enforcement weapon. As Mr. Justice Frankfurter has reminded us, "We must be wary against interpolating our notions of policy in the interstices of legislative provisions," *Scripps-Howard Radio v. FCC,* 316 U.S. 4, 11 (1942).

> "As our recent cases—particularly *Cort v. Ash,* 422 U.S. 66—demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent." [Footnote omitted.] *Cannon, supra,* 441 U.S. at 688.

* * * * *

"While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J.I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington, supra,* at [568]; *Cannon v. University of Chicago, supra,* at [688]. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us." *Transamerica, supra,* 100 S. Ct. at 245.

If the language and structure of the statute clearly demonstrate Congress' intent, we need go no further. If not, we must attempt to fathom Congress' intent by applying the factors set forth in *Cort v. Ash.* The first of these is whether the statute indicates that it was enacted for the "especial" benefit of a particular identifiable class of which the plaintiff is a member. We may not, however, infer an intent to create a private remedy merely from Congress' expressed desire to benefit the public generally or even to benefit everyone engaged in an entire industry or line of commerce. As the Court stated in *Cannon, supra,* 441 U.S. at 690:

"The language in these statutes—which expressly identified the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra,* and other laws enacted for the protection of the general public.[13]"

Footnote 13 reads in relevant part:

> "Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See *Piper v. Chris-Craft Industries*, 430 U.S. 1 ('unlawful' conduct); *Cort v. Ash, supra* ('unlawful' conduct); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (duty of SIPC to 'discharge obligations'); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (forbidding 'action, practice, or policy inconsistent' with the Amtrak Act); *Wheedlin v. Wheeler*, 373 U.S. 647 (setting procedure for procuring congressional subpoena); *T.I.M.E. Inc. v. United States*, 357 U.S. 464 ('duty of every common carrier . . . to establish . . . just and reasonable rates . . . .'); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (similar duty of gas pipeline companies)."

The term "especial" benefit refers to a specific, definable class, described by the Court in *Cannon* as "a special class of which the plaintiff is a member," 441 U.S. at 689. The broader that class, the weaker is any implication of intent to provide its members with a private remedy. Otherwise the "special class" would embrace everyone.

Thus, we must carefully search the language of the statutory provisions under consideration for any expression of intent to benefit a specific group, as distinguished from an intent to benefit an entire industry, line of commerce or the public at large. Absent such expression, the possibility that Congress

intended to provide a private remedy is so slim as to be virtually non-existent.

Assuming that the statute on its face evidences a desire to benefit a special class of which plaintiff is a member, we must next examine the statute as a whole and such relevant circumstances surrounding its enactment as may shed light on Congress' intent with respect to remedies. An important consideration in this search is whether and to what extent that statute expressly provides remedies other than a private right of action for its enforcement. The failure to provide any remedies is obviously not helpful to a private plaintiff, since "implying a private right on the basis of congressional silence is a hazardous enterprise, at best," *Redington, supra*, 442 U.S. at 571. But this is not dispositive, since "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make a private remedy available," *Transamerica, supra*, 100 S. Ct. at 246. On the other hand, if the statute *does* contain other provisions for its enforcement, such as judicial or administrative remedies, which would secure most if not all of the relief sought in the private action, a private remedy will not ordinarily be implied. The Court has recently reiterated the principle of statutory construction in *Kissinger v. Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223, 4226 (March 4, 1980), and in *Transamerica, supra*.

> "Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular

> mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). See *Amtrak, supra*, 414 U.S. at 458; *Securities Protection Investment Corp. v. Barbour*, 421 U.S. 412, 419; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471." *Transamerica, supra*, 100 S. Ct. at 247.

It is reasonably clear that the broader the scope and type of the expressly-provided remedies, the less is the need or justification for implying an unmentioned additional private remedy. In such circumstances it is highly unlikely that "Congress absentmindedly forgot to mention an intended private action." *Transamerica, supra*, 100 S. Ct. at 247 (quoting *Cannon, supra*, 441 U.S. at 742).

Next in our search for legislative intent we look to the legislative history of the statute. The most reliable and persuasive indicia of congressional intent, of course, are Senate and House Committee Reports. *United States v. International Union (UAW-CIO)*, 352 U.S. 567, 585-86 (1957); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *International Tel. & Tel. Corp. v. General Tel. and Electronics Corp.*, 518 F.2d 913, 921 (9th Cir. 1975); *American Airlines, Inc. v. CAB*, 365 F.2d 939, 949 (D.C. 1966).

Absent definitive statements on the issue of private remedy by those solons vested with primary responsibility for the statute, certain surrounding relevant circumstances may shed light on Congress' intent as to remedies, such as its consideration and/or rejection of an express private remedy, its statements of understanding as to the necessity or lack of it for such a

provision, whether an implied remedy is consistent with the statute's underlying purposes and with any other enforcement measures expressly provided by it, and whether the private remedy is one traditionally relegated to other tribunals, such as administrative bodies or state courts. Most of these other circumstances, however, while of some relevance, usually offer but a weak reed upon which to rest a determination of Congress' intent. There comes a point where legislative history becomes so will-o'-the-wisp or far-fetched with respect to the matter in issue that we run the danger of attributing to Congress thoughts it never actually had. "The search for significance in the silence of Congress is too often the pursuit of a mirage," *Scripps-Howard Radio v. FCC, supra*, 316 U.S. at 11. This ethereal process is particularly illusory, stultifying and unrealistic where, as here, we may reasonably expect, because the issue of a private damage remedy is so important that, had Congress approved or acquiesced in a private right of action, it would have said so somewhere in the thousands of pages of legislative history on the Act.

For these reasons, where it is claimed that Congress has created the significant and potentially devastating remedy of a private action for damages, under which liability could amount to hundreds of millions of dollars, primary weight should be placed on the language of the statute and on clear, unequivocal statements by those responsible for its enactment. As the Supreme Court has recently emphasized, "absent a clearly expressed legislative intention to the contrary," the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 48 U.S.L.W. 4658, 4659 (June 9, 1980). Extrapolations based on gossamer-

thin fabric, requiring speculative assumptions as to Congress' intent are to be avoided. To rely upon such weak inferences is to indulge in judicial legislation. If, as the majority states (footnote 17) was the case with the 1974 amendments to the Commodity Exchange Act, Congress makes a *"complete overhaul"* of a statute, expressly creating other remedies, it is reasonable to expect that it will indicate any intent to create such an important right as that to bring a private suit by an express grant, which would take but one sentence, rather than by silence.

A GENERAL OVERVIEW OF THE COMMODITIES EXCHANGE ACT

Before turning to the specific language of the Commodity Exchange Act, 7 U.S.C. §§ 1, *et seq.*, relied upon by appellants as the basis for their claim of implied private rights of action against (1) future commission merchants and brokers, §§ 4b, 9(b), 7 U.S.C. §§ 6b, 13(b), and (2) exchanges or contract markets, §§ 5(d), 5a(8), 7 U.S.C. §§ 7(d), 7a(8), a brief overview of the Act is helpful. Trading in commodity futures has dramatically increased over the last half-century, giving rise to problems of public importance, such as the dangers of price manipulation, cornering of markets and fraud by broker-dealers upon their customers. As these problems increased, more stringent public supervision and control of markets and brokers became necessary. From 1922, when Congress enacted the Grain Futures Act to give the Secretary of Agriculture supervisory power over grain exchanges, until 1974, when the Commodity Futures Trading Commission Act was enacted, creating a new indepen-

dent agency, the Commodity Futures Trading Commission (CFTC) with plenary and exclusive authority over both futures markets and traders on those markets. Congress has gradually increased public control to the point where we now have an elaborate regulatory scheme designed to assure the public of honest and orderly futures trading, and to prevent price manipulation, fraud and sudden or unreasonable price fluctuations in commodity prices.

This extensive all-embracing system was described by House and Senate Reports as intended to create a "uniform," "comprehensive," "complete" and "coherent" regulatory structure. H.R. Rep. No. 93-975, *supra*, at 1; S. Rep. No. 850, 95th Cong., 2d Sess. 10, 13 (1978). The Act authorizes a wide variety of control mechanisms, including the licensing of contract exchanges and trading personnel, and a full panoply of enforcement powers, both administrative and judicial, including procedures for the award of damages in reparations proceedings, arbitration, imposition of civil fines of up to $100,000 for violations, issuance of cease and desist orders with fines of up to $100,000 per day for noncompliance, conduct of investigations with power to compel attendance of witnesses and production of documents, revocation of an exchange's designation, suspension of members of exchanges from trading privileges, institution of proceedings in federal court to compel compliance with orders or to enjoin violations of the Act, and the assessment of criminal penalties for violations of the Act and price manipulation, felonies punishable by a fine of not more than $500,000 or imprisonment up to five years, or both.

Provisions for Regulation of Contract Exchanges

Under the Act the CFTC is vested with exclusive power to designate contract exchanges for trading in particular commodities, § 5 of Act, 7 U.S.C. § 7. Futures contracts may lawfully be traded only on such "contract markets" as are designated for the commodity traded, §§ 4 and 4h of the Act, 7 U.S.C. § 6 and 6h. In order to be so designated as a contract market and to continue to conduct business as such, an exchange must meet rigid requirements, including the adoption of procedures for the prevention of price manipulation. § 5(d) of the Act, 7 U.S.C. § 7(d). Section 5a of the Act places additional requirements on a contract market, including the requirement that it enforce all of its rules that have been approved by the CFTC. § 5a(8) of the Act, 7 U.S.C. § 7a(8). The CFTC may disapprove rules violative of the Act or of its regulations and compel exchanges to adopt additional rules, § 8a(7) of Act, 7 U.S.C. § 12a(7).

If a contract market violates the Act or the conditions of its designation the CFTC is empowered to suspend or revoke its designation, § 5b, § 6(a) of Act, 7 U.S.C. § 7b, § 8. In addition it may conduct such investigations as it deems necessary to ascertain the facts, § 8 of Act, 7 U.S.C. § 12(a), issuing such compulsory process as is needed for production of witnesses and documents, § 6(b) of Act, 7 U.S.C. § 15. The CFTC is authorized to issue its own cease and desist orders against exchanges found after hearing to be violating the Act or any regulations thereunder, and assess civil penalties of up to $100,000 for each violation, § 6b of Act, 7 U.S.C. § 13a. Refusal to comply with a CFTC cease and desist order is a misdemeanor punishable by fine of up to

$100,000 or imprisonment of not less than 6 months nor more than one year, or both, for each day of noncompliance. *Id.* The CFTC may seek federal relief against violation of the Act or regulations by anyone, including an injunction or restraining order to stop existing or threatened violations or a writ of mandamus compelling an exchange to comply. § 6c of Act, 7 U.S.C. § 13a-1. It may also direct contract markets to take emergency action to maintain an orderly market. § 8a(9) of the Act, 7 U.S.C. § 12a(9). Exchanges are also subject to criminal penalties for violations of the Act or price manipulation, felonies punishable by a maximum fine of $500,000 and prison term of 5 years. § 9(b) of Act, 7 U.S.C. § 13(b).

Provisions for Regulation of Futures Commission Merchants

The CFTC has equally awesome and pervasive powers over brokers and futures commission merchants (FCMs). It establishes requirements for registration of brokers as futures commission merchants, §§ 4d, 4f, 4g, 4k, 4p, 8a, of Act, 7 U.S.C. §§ 6d, 6f, 6g, 6k, 6p, 12a. Two substantive provisions of the Act are particularly relevant here. Section 4a authorizes the CFTC to fix quantitative limits on speculative trading, 7 U.S.C. § 6a, and by regulation the CFTC has fixed limits on short trading. 17 C.F.R. § 150.10. Section 4b prohibits any members of any exchange from defrauding his customer in connection with a sale. 7 U.S.C. § 6b.

The CFTC is authorized to deny trading privileges to any person violating the Act or attempting to manipulate commodity prices and may suspend or revoke the registration of a futures commission

merchant for violations. § 6(b) of Act, 7 U.S.C. § 9. It may also suspend, expel or otherwise discipline any exchange member or deny him access to the exchange, § 8c(1) of Act, 7 U.S.C. § 12c(1), including aiders and abettors, § 13 of Act, 7 U.S.C. § 13c, and review, affirm, reverse or modify an exchange's discipline of its own members, § 8c(3) of Act, 7 U.S.C. § 12c(3). Violations of the Act and commodity price manipulation are felonies punishable by a maximum term of up to 5 years imprisonment or a fine of not more than $500,000, § 9(b) of Act, 7 U.S.C. § 13(b). In addition, the CFTC may issue cease and desist orders against a broker engaged in or attempting price manipulation, § 6(c) of Act, 7 U.S.C. § 13b. Non-compliance constitutes a misdemeanor punishable by a fine of up to $100,000, imprisonment of not less than 6 months nor more than 1 year, or both, for each day of refusal to obey. *Id.* The CFTC may also, as with exchanges, seek mandamus and injunctive relief in the federal courts, § 6c of Act, 7 U.S.C. § 13a-1.

Provisions for Compensation of Persons Injured by Violations

The Act also provides detailed procedures designed to compensate persons damaged by violations of the Act. Contract markets are required to provide voluntary arbitration procedures for settlement of customers' complaints up to $15,000 against any member or employee, § 5a(11) of Act, 7 U.S.C. § 7a(11). This, of course, contemplates a swift, inexpensive method of resolving smaller claims.

A much more comprehensive and complete compensatory remedy available to those with large claims is

provided by § 14 of the Act, 7 U.S.C. § 18. Section 14 provides for the institution of an administrative "reparations" proceeding by "any person" (which includes plaintiffs here) against any person registered under §§ 6d, 6e, 6j and 6m of the Act, including a futures commission merchant, for damages caused by a violation of any provision of the Act or any rule, regulation or order thereunder. The CFTC is required first to review the facts set forth in the petition and, if it believes these warrant action, it must forward a copy of the complaint to the respondent for satisfaction or response. If the CFTC after hearing finds that the registered merchant or broker has violated the Act it must determine the amount of the damage and order the offender to pay the amount to the complainant. If its order is not satisfied the CFTC may seek enforcement in the federal district court where the complainant resides, which is expressly empowered to issue orders, writs and process anywhere in the United States. The respondent against whom the Commission has issued a reparations order may obtain review by a United States Court of Appeals upon posting of a bond in double the amount of the reparations awarded.

Unless the registrant against whom a CFTC reparations order has been issued shows within 15 days thereafter that he has satisfied the order or taken an appeal to a federal court of appeals, which is authorized to review the order, the Commission must prohibit him from trading on all contract markets and his registration is automatically suspended, § 18(f), 7 U.S.C. § 14(f). The Act thus provides an efficient and inexpensive method whereby any injured person may obtain compensatory damages in an unlimited amount against a broker for violations of the Act, thus avoiding

much of the expense and delay involved in costly court actions, which necessitate extended use of scarce judicial resources.

Applicability to the Present Case

The complaints in the present action, to the extent that they seek relief based on violations of the Act against the three broker-defendants registered as futures commission merchants with the CFTC (Heinold Commodities Inc., Clayton Brokerage Co. of St. Louis, Inc., and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc.) pursuant to § 4d of the Act, 7 U.S.C. § 6d, are completely remediable under the express provisions of the Act itself. In addition the CFTC may conduct, and as to some short sellers and agents of certain brokers in this case has conducted, investigations leading to imposition of sanctions, including heavy fines and prohibitions against trading on a designated contract markets.[2]

To the extent that appellants seek relief against the designated contract exchange defendants (New York Mercantile Exchange and its officers) based on violations of the Act, the reparations procedure provided by § 14 of the Act is not made available. This omission,

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[2] As a result of the CFTC investigation, Simplot and his various companies entered a consent decree pursuant to which they were assessed a fine of $90,000, and prohibited from trading futures contracts for six years. Similarly, Taggares and his companies entered into a consent decree pursuant to which they were assessed a fine of $15,000 and prohibited from trading futures contracts for four years. CFTC investigations against various long traders and certain agents of brokers are still pending. Although the CFTC has not conducted an investigation of the defendant brokers here, the Clearing House Committee of the Exchange assessed heavy penalties against defendant Clayton for its failure to comply with Exchange Rule § 44.02, which requires members of the exchange who are not in a position to make delivery of a commodity to enter a liquidating order not later than five minutes before the closing of trading.

however, does not appear to have been an oversight, but rather a move deliberately designed to protect exchanges against ruinous damage recoveries which might seriously weaken them or drive them out of business. The existing administrative remedies, including the broad disciplinary action that the CFTC was authorized to employ, coupled with its power under § 6b to impose a fine of up to $100,000 on an exchange for each offense, were sufficient to remedy non-compliance by an exchange with the Act's stringent requirements.[3]

Thus the Act, far from being silent on the subject of remedies for its enforcement, provides a series of specific remedies, including administrative reparations in prescribed circumstances, enforceable through and reviewable by federal courts. This tends to negate the inference that Congress intended implied private rights of action to exist after its complete overhaul of the Act in 1974 and simply forgot to mention this remedy. The structure of the Act itself, therefore, affords no assistance to the plaintiffs but on the contrary supports the dismissal of their claims.[4]

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3 Here the CFTC administrative proceeding against the New York Mercantile Exchange resulted in a consent decree and a $50,000 civil penalty.

As for defendants Simplot and Taggares, the majority claims (opinion, p. 49) that it is "unimaginable" that Congress could have intended to relieve such defendants from large civil liability. The majority misses the point. Whether a private right of action exists against such purchaser-speculators as Simplot and Taggares is not at issue in this case. More significantly, it escapes me how the majority can claim that we are somehow "withdrawing" a pre-existing private right of action against defendants like Simplot and Taggares, in light of the fact that *no case* has ever held that a private right of action exists in favor of one speculator against a purchaser-speculator. There is simply no remedy for us to "withdraw."

4 As administrative agencies for obvious reasons are wont to do, the CFTC here contends that the implication of private rights of action

THE SPECIFIC PROVISIONS OF THE ACT RELIED UPON BY THE APPELLANTS

(1) *Sections relied on to support claims against the registered futures commission merchants.* (§ 4b, 9(b), 7 U.S.C. §§ 6b, 13 (b))

The plain language of § 4b, 7 U.S.C. § 6b, upon which plaintiffs mainly rely as authority for their private action against the broker-defendants, shows that it does not refer to the obligations of broker-dealers toward third parties, such as the plaintiffs here, but to their obligations toward their own customers. Plaintiffs, who

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is necessary to effectuate the purposes of the statute and claims that its views on the matter are entitled to considerable deference. The Supreme Court, however, has consistently rejected such claims. In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1976), the Court stated with respect to the SEC's position on the need for private rights of action that the SEC's "presumed 'expertise' in the securities law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in the particular case. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)."

Moreover, the Supreme Court has significantly rejected the implication of a private right of action, despite the urgings of the relevant administrative agency, in such cases as *Transamerica, supra*, 100 S. Ct. 242; *Redington, supra*, 422 U.S. 560; *Piper, supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738 (1974); *T.I.M.E. Inc. v. United States, supra*, 359 U.S. 464. Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of the statute, as revealed by its language, purpose and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters v. Daniel*, 439 U.S. 551, 556 n.20 (1979)).

are speculators in the futures market, are not claiming fraud on the part of broker-dealers who handled their accounts but fraud on the part of other brokers with whom they had no relationship who allegedly participated in a conspiracy with short sellers and others to artificially depress the price of May 1976 potato futures through manipulation and excessive short sales in violation of the Act.

Section 4b reads in pertinent part:

> *"It shall be unlawful (1) for any member of a contract market* . . . in or in connection with *any order . . . for or on behalf of any other person,* or (2) *for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery . . . for or on behalf of any other person. . . .*
>
> (A) to cheat or defraud or attempt to cheat or defraud *such other person;*
>
> (B) willfully to make or cause to be made to *such other person* any false report or statement thereof, or willfully to enter or cause to be entered for *such person* any false record thereof;
>
> (C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for *such person."* (Emphasis added.)

Only the person on whose "behalf" a contract is made by a member is protected by § 4b from the fraud and deceit on the part of that member in the making of a

futures contract. The "person" is the customer for whom the futures contract is made. The introductory paragraph defines the subject matter of the action in terms of a "contract of sale . . . for or on behalf of any other person." Subsections (A), (B) and (C) then limit the prohibited activities to certain forms of fraud by the broker upon "such other person" (i.e., his customer). The offense, therefore, exists only when a member cheats or defrauds *his own customer.*

Nowhere does § 4b mention parties having no connection to the contract. Nor, despite the majority's effort to strain a broader coverage out of the section's language, is there any indication that Congress intended to create the massive liability that would result if broker-dealers were made liable to every trader active in the market at a given time. See *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 733 n.5 (1975) ("The wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large" (emphasis in original)). The express mention of customers only as beneficiaries, just like the mention of purchasers and sellers in *Blue Chip Stamps,* negates any intent to include anyone else.

There is no support in the legislative history for the majority's broad reading of § 4b. To the contrary, language in relevant House Reports indicates just the opposite. The 1934 House Report on what was to become § 4b states:

> "Section 4b prohibits traders in acting *for customers in futures transactions to cheat, defraud, or deceive customers,* or to bucket or offset such

> orders against orders for others." H. R. Rep. No. 1637, 73d Cong., 2d Sess. 5 (1934). (Emphasis added).

The 1935 House Report confirms that interpretation:

> "Section 4b makes it unlawful for members of contract markets, and correspondents, agents, and employees thereof, in connection with orders to make or the making of contracts of sale of any commodity in interstate commerce to cheat, defraud, or deceive *the customer*, or to bucket the order." H. R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). (Emphasis added).

The legislative history of the 1968 amendments also refutes the majority's contention. Speaking in support of legislation to amend § 4b, Representative Hathaway introduced the testimony of Assistant Secretary of Agriculture Mehrens, who had testified before the House Committee on Agriculture, stating in part: "We ask that this provision [§ 4b] be expanded to cover all persons who handle *customer* orders or funds. . . . The proposed legislation . . . would . . . give *customers* who deal in commodity futures with nonmembers the full protection of the Act." 113 Cong. Rec. 23651 (Aug. 22, 1967). See S. Rep. No. 947, 90th Cong., 2d Sess. 6 (1968). There was no indication that non-customers, such as plaintiffs here, were entitled to invoke the section against third parties who were not their brokers or fiduciaries. See in accord, *Chipser v. Kohmeryer & Co.*, 600 F.2d 1061, 1065 (5th Cir. 1979) ("Section 4b makes it unlawful for a commodities broker to 'cheat or defraud' a *customer* or willfully deceive or make false statements or reports to a *customer* in connection with

transactions on the commodities exchange." (Emphasis added)).

Aside from the fact that § 4b is limited to protection of customers against fraud on the part of broker-dealers acting on their behalf, there is nothing in the section indicating that Congress intended to provide even these customers, much less others such as appellants, with a private civil remedy against broker-dealers. The Supreme Court has repeatedly stated that before a private right of action will be implied it must be shown to be "necessary" to effectuate Congress' purpose. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (private right of action not necessary since plaintiffs had an alternative remedy); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 (1977); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977). Here a private remedy would not be necessary to enforcement of § 4b, since the existing administrative procedures provided by the Act, including the award of reparations, amply protect the customer. The creation of an implied private judicial remedy would not only be unnecessary but would run counter to Congress' established remedies, since the customer could hardly seek damages in a civil court action without waiving his right to recover the same damages in a reparations proceeding. A private right would therefore be duplicative.

Nor does the language of § 9(b) of the Act, 7 U.S.C. § 13(b),[5] the other section of the Act relied on by

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[5] Section 9(b) reads:

"(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner

plaintiffs, sustain a private right of action here. It is a criminal statute to be enforced by criminal penalties, as was specifically recognized by Congress when it amended the provision in 1936. H.R. Rep. No. 421, 74th Cong., 2d Sess. 9 (1935). There is no language in § 9(b) even remotely suggesting that it was enacted for the "especial" benefit of a special class of which plantiffs are members. Indeed, the statute makes no reference to any beneficiaries at all. Like § 206 of the Investment Advisors Act construed in *Transamerica, supra,* it "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." 100 S. Ct. at 247. To spell a private right of action out of such a general criminal statute would permit anyone who claimed to have been injured by a violation of the Act to sue, regardless of Congress' intent. The Supreme Court "has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large," *Cannon, supra,* 441 U.S. at 692 n.13; *Cort v. Ash, supra,* 422 U.S. at 79-80 (18 U.S.C. § 610, prohibiting corporate contributions), and it has rarely implied a cause of

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any such commodity, or knowingly to delivery or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution."

action under a criminal statute. *Chrysler Corp. v. Brown, supra,* 441 U.S. at 316. Despite the majority's protestations, this is not one of those rare cases.

Nowhere else in the language or structure of the Commodity Exchange Act can one find any express or implied intent to benefit a special class, much less commodity speculators such as plaintiffs here. The reason is that the Act was not enacted for the "especial" benefit of any particular class but to protect the public and primarily producers and customers, against wide, sudden or unexplained fluctuations in the prices of commodities, which could ruin producers and cause serious hardship to consumers, processors, merchandisers, millers, dealers, and shippers. This was made clear by Congress in its declaration of purposes and policies underlying the Act, found in § 3 of the Act, 7 U.S.C. § 5, which has remained virtually unchanged since its enactment in 1922. Section 3 provides:

> "Transactions in . . . 'futures' are affected with a national public interest; . . . the prices involved in such transactions are generally quoted and disseminated . . . as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodities on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in

> the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodities and products and byproducts thereof in interstate commerce and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodities and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

Congress' solicitude was recently summarized by testimony in 1974 of the Administrator of the Commodity Exchange Authority (the predecessor of CFTC), Alex Caldwell, before the Senate Committee considering proposed amendments to the Act:

> "Originally back in 1922 it was the feeling of Congress that the Commodity Exchange Act was designed to protect producers. It is now recognized that it is not designed only to protect producers, but also the merchandisers and processors and ultimately the consumers." Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. at 234 (1974).

The congressional debate on the 1974 amendments amply confirms that the Act was not designed for the *especial* benefit of speculators. Representative Mayne, a member of the Committee on Agriculture, for example, stated "The purpose of the legislation before us today can best be described as a means for providing the fairest possible market for legitimate hedgers. . . .

H.R. 13113 will provide those regulations which are reasonably necessary to guide the activities of speculators . . . and no legitimate speculator . . . should object to its provisions." 80 Cong. Rec. 10739 (April 11, 1974). Representative Zwach, also a member of the Committee, stated "This legislation creates an impartial umpire, a commission that will handle the public interests, the producers' interests, the consumers' interest." *Id.* at 10740. Representative Adams claimed that "Our experiences . . . demonstrate the disastrous effects which unfair trading practices can have on consumers and producers alike." *Id.* at 10741. And Senator Scott claimed that "For the consumer, this bill will mean that commodity prices will more clearly reflect demands and actual available supplies. The kind of speculation which places artificial strains on prices will be under close scrutiny. This will mean more realistic prices for the farmer and the end products like break for the consumer will likewise be less subject to rapid increase and decrease in demand." 80 Cong. Rec. 30467 (Sept. 9, 1974).

Although speculators were recognized as necessary to the extent that they might, by increasing market volume and assuming market risks, provide more liquidity in the market for the benefit of producers and consumers and thus hopefully minimize price fluctuations to achieve some of the protection and price stability considered beneficial, Congress generally took a dim view of speculative activity in the commodity futures market because of the dangers speculators posed to farmers, producers, consumers, processors, shippers and hedgers. Unlike a hedger, who actually produces or handles the commodity, giving him an interest in the cash market for it, and trades in futures

as a means of minimizing his risks, the speculator, such as plaintiffs here, has no underlying interest in the cash market. He merely attempts to profit on the rise or fall of prices for commodity futures. Congress' skeptical attitude toward the benefits of speculation and speculators is further demonstrated by the failure of § 3, which outlines the Act's purposes, to mention speculators or investors as beneficiaries. In contrast § 3 does refer expressly to the interest of the "producer," "consumer," "shippers, dealers, millers and others engaged in the handling of commodities." Nor is this omission explained by the majority's suggestion that Congress desired to state a commerce power basis for the legislation. If speculators were viewed as a tempering and liquifying influence on an interstate market, reference to them in § 3 would have been consistent with a desire to invoke the Commerce Clause.

The various House and Senate reports on the Act and its various amendments over the years simply confirms the plain language of § 3. In 1921 the Senate Committee stated with respect to the proposed Grain Futures Act of 1922 (the first version of what was to become the Commodity Exchange Act):

> "It is believed that this bill will, by wiping out obvious abuses that are practiced on grain exchanges, result in more stable markets, and thereby enable the *producers* to secure more nearly the market price for the grain that has been possible in the past.
>
> *"Its primary purpose is to eliminate from the market some of the undesirable practices of professional speculators.*

> "In addition to curbing excessive speculation and manipulation, the bill authorizes the Secretary of Agriculture to provide means to prevent members of the exchanges from disseminating false and misleading reports on the market or on crop conditions. This in itself will be a check of the activities of professional speculators." (Emphasis added). S. Rep. No. 212, 67th Cong., 1st Sess., 4-5 (1921).

In 1936 the Senate Report on the proposed amendments stated:

> "It is of utmost importance . . . that means be adopted whereby the Government may be in a position to protect the producer and the public generally against abuses growing out of uncontrolled speculation on public markets." S. Rep. No. 1431, 74th Cong., 1st Sess. 3 (1936).

The 1936 House Report opened with a quote from President Roosevelt's first message to Congress which urged Congress to eliminate "unnecessary, unwise and destructive speculation" and "restrict, as far as possible, the use of exchanges for solely speculative operations," H.R. Rep. No. 421, 74th Cong., 1st Sess. 2 (1935), see 78 Cong. Rec. 2264 (1934), and went on to state

> "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves . . .

> "Since the passage of the Securities Exchange Act of 1934 there has been observed an increasing tendency on the part of professional speculators to transfer their activities from the securities markets, a tendency which makes the enactment of this bill without further delay of utmost importance." *Id.* at 2.

The 1974 House Report opened once again with President Roosevelt's attack on speculation, H.R. Rep. No. 93-975, *supra*, at (iii) and the Senate reports in both 1974 and 1978 used as their statement of purpose the above quoted language from the 1936 House Report. S. Rep. No. 1131, 93d Cong., 2d Sess. 1, 14 (1974); S. Rep. No. 850, 95th Cong., 2d Sess. 12 (1978). The majority contends that Congress' concern about injury to the "markets themselves" evinces an intent to protect speculators. But the clear language of the legislative history refutes that contention. Congress intended to protect exchanges from the abuses of their own members and other traders, not to protect speculators from themselves. S. Rep. No. 93-1131, *supra*, at 14; S. Rep. No. 95-850, *supra*, at 8.[6]

Throughout all these years, as the majority recognizes, the congressional debates were replete with vituperative attacks on speculators, particularly in 1922 and 1936, e.g., 61 Cong. Rec. 4763, 4765, 4768 (1921) (Remarks of Senator Clapper that if the farmer is to survive, "the grain gambler must go"); e.g., 80 Cong. Rec. 7857 (1936) (Remarks of Senator Murray

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[6] As stated by this court in *Miller v. New York Produce Exchange*, 550 F.2d 762, 768 (2d Cir. 1977), "the ultimate aim and intent of the Act is the elimination of wrongful conduct on the part of the traders. It is they, not the exchanges, who manipulate commodity markets."

that "the grain producer's income will be materially increased if the wild orgies in grain speculation can be controlled"). Congressional hostility toward speculation, though tempered, continued in 1968 and 1974. E.g., 113 Cong. Rec. 34404 (Nov. 30, 1968) (Remarks of Representative Sullivan that "excessive speculation in futures . . . has not only contributed to inflationary surges in the futures market but has caused spectacular increases in consumer prices"); 80 Cong. Rec. 30465 (Sept. 9, 1974) (Remarks of Senator Hart that "This bill gives the commission authority . . . to prevent inflationary prices which do not reflect supply and demand—but are the result of speculation. . . .").

Moreover, it has been the speculators and the Congressmen representing their interests who have consistently opposed the expansion of federal regulation of the commodity markets, since they realize that it is they who are being regulated. See, e.g., H.R. Rep. No. 1522, 73d Cong., 2d Sess. (1934) (minority report); H.R. Rep. No. 93-975, *supra*, at 166 (1974) (minority report) ("We believe that the bill's premise displays . . . a lack of faith in . . . the importance of speculators. . . ."); 120 Cong. Rec. 10744 (April 11, 1974) (Statement of Representative Symms that we need "more not less" speculation). It may well be that investors do benefit from an honest market, but that is a far cry from concluding that the Act was enacted for their "especial benefit." As put on the House floor "Speculation may not be evil, but neither is it a thing of beauty and a joy forever." 113 Cong. Rec. 10838 (August 11, 1967) (Statement of Assistant Secretary of Agriculture Mehrens before the House Committee on Agriculture, quoted on the House floor). And Representative Smith in 1974 summed up the prevailing view that speculation was a necessary evil:

> "When these markets were first brought under Federal regulation back in 1922—Grain Futures Act—it was recognized that involving some gamblers would be necessary in order to provide the liquidity needed so dealers in commodities could readily hedge their transactions.
>
> "The Commodity Exchange Act was designed to limit and regulate this form of gambling in tandem with hedging for the purpose of reducing 'sudden or unreasonable fluctuations in the prices . . . which are detrimental to the producer or the consumer and the persons handling commodities. . . .' Clearly, the primary purpose of the law which permits commodity markets to exist is to serve those who hedge, and speculation is to be permitted only to the extent that it serves the primary purpose." 120 Cong. Rec. 10750 (April 11, 1974).

Thus, given the general opposition of speculative interests to these bills and Congress' skepticism about the benefits of speculation and its keen awareness of the dangers posed by speculative excesses, it is disingenuous to claim that the Act was designed for the *especial* benefit of speculators. Speculators such as plaintiffs can hardly be said to be the "favored wards" of Congress. Nor is the language of the Act as a whole or of its provisions drafted with an "unmistakable focus on the benefited class." *Cannon, supra,* 441 U.S. at 691. The Court's language in *Piper v. Chris-Craft Industries, Inc., supra,* 430 U.S. at 37, applies here:

> "As previously indicated, examination of the statute and its genesis shows that Chris-Craft [a defeated tender-offerer] is not an intended beneficiary of the Williams Act, and surely is not one 'for

> whose especial benefit the statute was enacted.' Ibid. To the contrary, Chris-Craft is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class, shareholders-offerees. As a party whose previously unregulated conduct was purposefully brought under federal control by the statute, Chris-Craft can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."

Accord, *Liang v. Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979) (nothing in the language of § 9(b) or its legislative history indicates that it was enacted for the especial benefit of speculators). *Stone v. Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980) ("the entire history of commodities regulation" suggests that "ensuring the integrity of the market system, rather than merely protecting individual customers" has been the motivating force behind the Act.").[7]

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[7] The majority mistakenly relies on a statement in the 1978 House Report to the effect that under the 1936 amendments "the community protected under the federal commodities law was expanded to include speculators," H.R. Rep. No. 1181, 95th Cong., 2d Sess. 84 (1978). Quite apart from the fact that the quote comes from a law review article simply incorporated into a subsequent House Report (1978) and is therefore not entitled to the weight normally given to committee reports, see *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 48 U.S.L.W. at 4662 (post-hoc statement of a subsequent conference committee report not entitled to much weight in discerning the intent of an earlier Congress) and *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 ("[t]hese isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment"), the statement simply does not support plaintiffs' position here. Even assuming that the legislative

Thus § 9(b), like § 4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors.[8] In any event,

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history does show an intent to offer *some* protection to speculators, there is no suggestion that Congress enacted the statute for the *especial* benefit of speculators or intended to confer a private right of action in favor of speculators. Indeed, the legislative history is just to the opposite; Congress was primarily concerned about producers and consumers.

The majority's reliance on our decision in *Ames v. Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174 (2d Cir. 1977), as supporting a private right of action is similarly misplaced. There the dispute involved a *customer and his broker* and we declined to compel arbitration, noting that "on this appeal, we are not called upon to decide whether the complaint states a claim for relief." *Id.* at 1176. Thus, the court's passing statement that the Act was enacted for the protection of "investors" has no bearing whatsoever on the question before us, whether the Act was designed for the especial protection of these plaintiffs, who are speculators, not customers.

Footnote 25 of the majority opinion suggests that regulated persons may belong to the class for whose special benefit a statute is enacted, with which we do not disagree. However, where (as here) Congress has specifically enumerated the persons for whose benefit the statute has been enacted (i.e., the public, producers, consumers, shippers, dealers, millers and hedgers) but has studiously omitted speculators, we may reasonably infer that Congress did not intend to include speculators among the benefited group.

8 Some of the plaintiffs here also allege that the defendant brokers have violated § 4a of the Act, 7 U.S.C. § 6a. Section 4a states in relevant part that "Excessive speculation in any commodity under contracts of sale of such commodity for future delivery . . . causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, *is an undue and unnecessary burden on interstate commerce in such commodity*" and authorizes the CFTC to fix quantitative limits on trading "for the purpose of diminishing, eliminating, or preventing such burden. . . ." (Emphasis added). The CFTC has set by regulation certain limits on short trading which are alleged to have been violated by the short sellers with the knowledge of their brokers. 17 C.F.R. § 150.10.

No court has ever found a private cause of action to exist under § 4a. The section serves as a general prohibition against excessive

even assuming *arguendo* that this criminal statute benefits speculators, there is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act.

(2) *Sections of Act relied on by plaintiffs to support claims against the contract market defendant.* (§§ 5(d), 5a(8) and 9(b), 7 U.S.C. §§ 7(d), 7a(8) and 13(b))

Appellants rely upon portions of §§ 5 and 5a of the Act, 7 U.S.C. §§ 7 and 7a, and to a lesser extent on § 9(b), 7 U.S.C. § 13(b), already discussed above, as the

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speculation in commodity futures and its purpose—the removal of the burden of excessive speculation on interstate commerce in order to stabilize the price of the commodity itself, not the price of the future contract—is clearly described. The plain language of the section, then, indicates that it was designed for the protection of the general public. Nor is there any suggestion that Congress intended to confer any private right of action upon any person, let alone a speculator, who might be claimed to be damaged as a consequence of a violation of the section. See *Transamerica, supra*, 100 S. Ct. at 247; *Kissinger, supra*, 48 U.S.L.W. at 4226. Only one case has even addressed the issue of an implied cause of action under § 4a and it concluded that investors were not within the class of persons for whose especial benefit the statute was created, reasoning that "the excessive speculation provision is primarily intended to protect outsiders from the activities of all speculators, not speculators from themselves." *Liang v. Hunt*, 477 F. Supp. 891, 893 (N.D. Ill. 1979).

Plaintiffs also charge that the defendant brokers violated Exchange Rule § 44.02 by failing to have liquidating orders placed within five minutes after the close of the trading limits even though they knew or should have known that their customers could not deliver potatoes. Since it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange, *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980), it is not surprising that the majority makes no effort to claim that plaintiffs here have a cause of action against the brokers for their alleged violation of Exchange Rule § 44.02. Accordingly, we need not address the issue.

source of an implied private right of action against New York Mercantile Exchange and its officers. Section 5 is a licensing statute which imposes upon the CFTC the duty of designating boards of trade as "contract markets" provided they comply with specified conditions and requirements, including in subdivision 5(d) "the prevention of manipulation of prices and the cornering of any commodity by the dealers and operators" upon the Exchange.[9] Section 5a, 7 U.S.C. § 7a, provides that each contract market shall comply with 12 requirements, including the enforcement of its own rules, regulations and resolutions which have been approved by the CFTC, § 5a(8) of the Act, 7 U.S.C. § 7a(8).[10]

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9 Section 5 provides in relevant part:

"The Commission is hereby authorized and directed to designate any board of trade as a 'contract market' when, and only when, such board of trade complies with and carries out the following conditions and requirements:

a. [when it is located in a terminal market where any cash commodity is sold in sufficient quantities so that futures contracts fairly reflect the general value of the commodity]
b. [when it provides for the filing of reports concerning the transactions occurring on the exchange]
c. [when it provides for the prevention of the dissemination of false information by the board or any member]
d. When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board. . . ."

10 Section 5a(8), 7 U.S.C. § 7a, reads in relevant part:

"§ 5a *Duties of contract markets*

"Each contract market shall—

* * * * *

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have

Plaintiffs here allege that the New York Mercantile Exchange violated the Act and the Regulations by failing (1) to maintain an orderly market for trading, (2) to report violations, (3) to direct the entry of liquidating orders, (4) to declare an emergency, (5) to extend the period for delivery or to allow delivery by truck, (6) to buy potatoes for the account of short sellers who did not make delivery as required by their contracts, and (7) to perform its duties as a contract market, including exercise of due care to halt manipulative practices.

As the Court pointed out in *Cannon, supra,* 441 U.S. at 690 n.13, a statute will ordinarily be construed as creating an implied private remedy only where it "explicitly conferred a right directly on a class of persons including the plaintiff in the case." Here the prescriptive language of § 5 and § 5a, like the reporting statute in *Redington, supra,* 442 U.S. at 569, "does not

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been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission: . . ."

In addition to subsection (8), § 5a requires contract markets to (1) furnish the CFTC with copies of its by-laws and regulations, keep records of all of the proceedings of its governing board, (2) require the operators of the warehouses to keep records and make them available for inspection by the CFTC, (3) obey CFTC orders concerning the delivery of the cash commodity, (4) require the party making delivery to furnish notice of intended delivery to the party obligated to accept delivery, (5) require that warehouse receipts be accepted as satisfaction of debt, (6) enforce its by-laws and regulations relating to the minimum financial standards required of those future commission merchants who are members of the market, (7) permit delivery of any commodity in a location which will tend to prevent price manipulation, (8) provide for an arbitration procedure for customer grievances, § 5a(11), and (9) submit to the CFTC for approval its by-laws, rules, regulations and resolutions. § 5a(12).

by its terms, purport to create a private cause of action in favor of anyone." Neither provision "grants private rights to the members of any identifiable class, nor proscribes any conduct as unlawful," *id.* They therefore cannot support a private cause of action in favor of these plaintiffs.

Nothing in the foregoing sections of the Act provides any basis for an inference that they were enacted for the especial benefit of plaintiffs, much less that a private right of action was intended. Here again Congress' adoption of a battery of other express remedies indicates it had no intent to create or approve an implied private right of action against exchanges. See *Transamerica, supra,* 100 S. Ct. at 247-48. Although exchanges may not be the subject of reparations proceedings, if they violate the Act the CFTC may suspend or revoke their designation as contract markets, §§ 5b, 6(a) of the Act, 7 U.S.C. §§ 7b, 8, sue in federal courts, which are expressly vested with jurisdiction, to enjoin violations, 6c of the Act, 7 U.S.C. § 13a-1, assess civil fines of up to $100,000 for each violation and issue cease and desist orders, non-compliance with which subjects the market and its officers to a $100,000 fine or imprisonment. § 6b of the Act, 7 U.S.C. § 13a. The exchanges, of course, are also subject to criminal penalties of up to a $500,000 fine and 5 years imprisonment for violations of the Act and price manipulation. § 9(b) of Act, 7 U.S.C. § 13(b).

Lastly, in 1968 Congress failed to enact a bill which would have made contract markets liable to aggrieved persons for violations of the Act. H.R. 9178, 90th Cong., 1st Sess. § 32 (1967); see Statement of Representative Fino introducing the bill, 113 Cong. Rec. 10839 (April 26, 1967). This indicates that

Congress did not intend to sanction a private remedy against exchanges.[11]

OTHER CIRCUMSTANCES POSSIBLY BEARING ON LEGISLATIVE INTENT TO CREATE OR APPROVE AN IMPLIED PRIVATE ACTION

(1) *Pre-1974 lower federal court decisions implying private rights*

Faced with the fact that nothing in the language of the Commodity Exchange Act, the various amendments of it over the years, and its legislative history even remotely suggests congressional intent to approve, much less create, an implied private right of action, the majority relies almost completely on the fact that prior to the 1974 amendments various lower federal courts, beginning in 1967, had implied certain types of private rights of action under the Act and that Congress' failure, in face of these decisions, to expressly extinguish or nullify these decisions must be taken as evidence of an intent *sub silentio* to approve the continued implication of private actions under the Act.[12] In short, the argument goes, in amending the Act

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11 Significantly, the 1968 amendments consisted of 27 sections. Of these, 13 sections and 3 subsections are identical to H.R. 9178, Representative Fino's bill, Pub. L. No. 90-258 §§ 1(a), 1(b), 3, 6, 7(a), 9, 10, 11, 13, 14, 15, 18, 19, 22, 30, 34; 82 Stat. 26, *et seq.* (1968), and 8 sections and 2 subsections are altered versions of his provisions, Pub. L. No. 90-258 §§ 2, 4, 5, 7(b), 8, 12(b), 16, 20, 24, 25; 82 Stat. 26, *et seq.* (1968). This indicates, of course, that Congress acted with discrimination and care in rejecting § 32, the provision authorizing private damage suits.

12 *Anderson v. Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, 437 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); *United*

in 1974 Congress had the burden of taking affirmative action to disapprove implied private rights found by some courts to have existed under the Act and, in the absence of its doing so, the holdings of these decisions may be presumed to survive.

The argument puts the cart before the horse. Where, as here, Congress has expressly provided for judicial and administrative means of enforcement, the burden is on plaintiffs to show a clear and affirmative congressional intent to approve a private right of action, not on Congress or defendants to show that the remedies provided by it are exclusive. *Transamerica, supra,* 100 S. Ct. at 247; *Securities Investors Protection Corp. v. Barbour, supra,* 421 U.S. at 419; *Amtrak, supra,* 414 U.S. at 458. The issue is whether Congress intended to approve a private right of action, not whether (as the majority frequently states, maj. opin. p. 65 n.40) it intended to "destroy" or "eliminate" a pre-existing private right, which assumes the matter in controversy. Nor may we simply presume that Congress by its silence intended to approve a "pre-existing" private right of action, since the Supreme Court has made clear that "in the absence of the clearest indication that

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Egg Producers v. Bauer International Corp., 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338, 1343 (E.D. La. 1972), *affd.*, 477 F.2d 113 (5th Cir. 1973); *Gould v. Barnes Brokerage Co., Inc.*, 345 F. Supp. 294, 295 (N.D. Tex. 1972); *Johnson v. Arthur Epsey, Shearson, Hamil & Co.*, 341 F. Supp. 764, 766 (S.D.N.Y. 1972); *Arnold v. Bache & Co.*, 377 F. Supp. 61, 65 (M.D. Pa. 1973); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir.), *revd. on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (per curiam); *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), *affd. sub nom., Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 423 (1977).

Congress intended that" a new statute "should preserve" a pre-existing private cause of action, it would "decline" to imply one under the new statute. *T.I.M.E. Inc. v. United States, supra,* 359 U.S. at 475. To hold otherwise is to stand the principles of *Cort v. Ash* and the more recent Supreme Court decisions on their heads. Quite apart from this fundamental defect, the argument must be rejected for the reason that a close examination of the decisions and legislative history relied on by the majority demonstrates that they do not support a *sub silentio* intent by Congress in 1974 to approve implied private rights of action.

In the first place the earlier decisions and legislative history do not reveal any long-recognized private cause of action in favor of speculators such as plaintiffs against contract markets or broker-dealers with whom the speculators had no customer-broker relationship. For 45 years prior to the first decision relied on by the majority the provisions of the Act were enforced solely through use of the administrative remedies made available to the Secretary of Agriculture and the Commodity Exchange Commission, the predecessor to the CFTC, and through criminal proceedings based upon violations of the Act. Despite such incidents as the manipulation of the onion futures market in the 1950's, see S. Rep. No. 1631, 85th Cong., 2d Sess. 1958), reprinted at 1958 U.S. Code Cong. & Ad. News 4210, 4214, the salad oil swindle of the early 1960's, N. Miller, The Great Salad Oil Swindle, and other less publicized schemes to manipulate the market and defraud participants, and despite the implication of a private right of action under the Securities Act as early as 1944, *Baird v. Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), no court prior to 1967

suggested that a private cause of action under the Act might exist.[13] Even the Commodity Exchange Commission believed that administrative sanctions and criminal penalties were the only means by which the Act could be enforced. See letter from Department of Agriculture, Commodity Exchange Authority, dated March 21, 1958, to counsel for the Senate Committee of Agriculture and Forestry, reprinted at 1958 U.S. Code Cong. & Admin. News 4216.[14]

Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967), was the first case to break the barrier. It is significant not because it was the first but because it is the case on which all of the later decisions implying a

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13 The majority opinion (footnote 16) chooses to interpret our statement as implying that "victims of frauds in futures trading had never resorted to the federal courts prior to *Goodman* (infra)", whereas we actually state that prior to that decision no court had held that a private cause of action under the Act would be recognized. There may well have been lawsuits, but the legal basis of the claims made in these suits is not reported and, more important, prior to 1967 no court to our knowledge ever passed on the issue here, i.e., the existence of an implied private right of action.

14 The letter reads in relevant part:

"Dear Mr. Stanton [Counsel on Agriculture and Forestry, United States Senate.]

* * * * *

"You requested a memorandum concerning the effect of the absence from these bills of any provision to amend section 9 of the Commodity Exchange Act so as to make a violation of proposed section 4j a violation of the penal provisions of the act.

"As you recognize, in the absence of a provision subjecting violations of the proposed section to the criminal provisions of the statute, it would appear that the *sole* means of enforcement afforded by the act would be by way of administrative complaints. [Emphasis added].

"Sincerely,

Rodger R. Kaufman,
Administrator."

private cause of action summarily relied. All of these were lower federal court decisions. The Supreme Court never passed upon the issue. *Goodman* involved a suit brought under § 4b by two customers against their broker-dealer in which they claimed they were defrauded by the broker-dealer. The court, relying on § 286 of the Restatement of Torts, found that the customers fell within the class of persons Congress intended to protect when it enacted § 4b (i.e., customers) and that violation of the section was a statutory tort for which the customers had a federal remedy. The court also relied on the dissent in *Wheeldin v. Wheeler*, 373 U.S. 647, 661-62 (1961), which stated that private rights are "implied unless the legislature evidences a contrary intention." Finding "no indication in the Commodity Exchange Act that Congress intended not to allow private persons injured by violations access to the courts," 265 F. Supp. at 447, the court implied a private remedy.

It hardly merits discussion that *Goodman*, in light of current law, was wrongly decided since it did not even purport to consider, as required by the recent cases of *Cannon, Redington, Transamerica,* and *Kissinger* and earlier by *Cort v. Ash*, whether Congress intended to create a private right of action when it enacted § 4b. Indeed, the Court has repeatedly rejected the tort rationale relied upon in *Goodman*, requiring a showing of Congressional intent to approve a private right of action. See, e.g., *Redington, supra*, 442 U.S. at 568, 578, quoting *Cannon, supra*, 441 U.S. at 688. More significantly, perhaps, is that *Goodman* may well have been incorrectly decided even under then existing law. The proposition that a private right of action will be implied unless Congress evinces a contrary intention is

unsupported by any prior holding and did not accurately reflect the state of the law as it then or later existed. Even *J.I. Case Co. v. Borak, supra,* 377 U.S. 426, widely considered to be the case in which the Supreme Court has gone the furthest in implying a cause of action, required more of a showing than did the *Goodman* court. The test, according to *Borak,* was whether a private right of action was necessary to effectuate Congress' intent in enacting the statute. *Id.* at 432.

Nor can we presume the correctness of the *Goodman* decision simply because it occurred during a period in which private rights of action were "routinely implied" by the courts. The majority overstates the extent to which courts were then implying private causes of action, ignoring such cases as *Wheeldin v. Wheeler,* 373 U.S. 647 (1963); *T.I.M.E. Inc. v. United States,* 359 U.S. 464 (1959); *Montana & Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951); *General Committee v. M.K.T.R. Co.,* 320 U.S. 323 (1943); *General Committee v. Southern Pacific Co.,* 320 U.S. 338 (1943); *Switchman's Union v. National Mediation Board,* 320 U.S. 297 (1943), all of which rejected such claims of private right. And even in the area of securities, the courts denied private rights of action. E.g., *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178 (2d Cir.), *cert. denied,* 385 U.S. 81 (1966); *O'Neill v. Maytag,* 339 F.2d 764 (2d Cir. 1964).

The majority contends, however, that the correctness of the *Goodman* decision, and the cases summarily following it, is irrelevant, reasoning that what matters instead is whether Congress perceived those cases to be correct when it enacted the 1974 amendments. But even accepting this proposition, not a single word of

approval of these decisions is found in the legislative history of the 1974 or any other amendments, much less mention of any of these decisions by name. Moreover, the lower court decisions relied on by the majority do not support its position. Of the 11 cases decided prior to 1974, 8 were brought *by customers against their brokers-dealers under* § *4b*, not by speculators like plaintiffs against broker-dealers with whom they had no relationship. See, e.g., *Anderson v. Francis I. du Pont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132 (5th Cir. 1970); *Johnson v. Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 746 (S.D.N.Y. 1972); *Gould v. Barnes Brokerage Co. Inc.*, 345 F. Supp. 294 (N.D. Tex. 1972); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972), *affd.*, 477 F.2d 113 (5th Cir. 1973); *Arnold v. Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1973). Likewise the Sixth Circuit's recent decision, *Curran v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (May 12, 1980), relied on by the majority, is not dispositive of this case since it also involved a suit by a customer against his broker under § 4 of the Act, 7 U.S.C. § 6. Although § 4b could conceivably be construed as protecting customers against being defrauded by their brokers, it certainly does not protect others, such as plaintiffs here, against fraud or manipulation by persons with whom they had no broker-dealer relationship.

To be sure, three cases did imply a private right of action in favor of someone other than a customer against his broker. However, two are irrelevant for the

purpose of inferring what Congress may have "perceived" the state of decision law on the subject to be in 1974. In *United Egg Producers v. Baurer International Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970), the court, relying on *Goodman*, implied a cause of action under § 9(b) of the Act in favor of a group of commodity producers, not customers or mere traders, who sought injunctive relief, not damages, against an import company to prevent them from releasing inaccurate investment information. In *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076 (S.D.N.Y. 1974), *affd. sub nom., Miller v. N.Y.P.E.*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977), the court, relying on *Deaktor, infra*, held that a cause of action was available to a broker-dealer, not a customer or even a trader, against an exchange under § 9(b). Since that case, however, was decided after the House had passed the 1974 amendments, Congress could not have been aware of it. It therefore offers no support for the majority's theory that Congress, by relying upon it, thought it unnecessary to provide expressly for a private right of action.

Thus plaintiffs are reduced to one case, *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *revd. on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), decided less than a year before the enactment of the 1974 amendments, as support for the private cause of action asserted here. There a trader brought suit against an exchange for a violation of § 5a(8) and § 9(b), and the court, relying on *Goodman*, found that § 9(b) was intended to protect the interests of the plaintiff traders and accordingly implied a cause of action under it, though not under § 5a(8). Although the majority contends that the

Supreme Court's reversal of *Deaktor* can be read as support for the lower court's implication of a private right of action, that argument is without merit since the Court expressly declined to decide the issue and held that plaintiffs must proceed through the CFTC, not through the courts. See 414 U.S. at 115. Where the Supreme Court has declined to reach an issue, it is serious error to parse the Court's opinion for some hidden indication that the Court actually decided the issue after all. The majority's strained interpretation of *Deaktor* is illusory.

In speculating as to what Congress must have "perceived" about the state of the law relating to implied rights when it overhauled the Act in 1974, one must take into account as against *Deaktor*, which was not finally disposed of by the Supreme Court until December 3, 1973, see 414 U.S. 113, the Court's decision in *Amtrak, supra*, 414 U.S. 453, decided on January 9, 1974. There the Court rejected a claim of an implied private right under § 307(a) of the Amtrak Act, relying on Congress' rejection of an express remedy and its express authorization of other remedies, stating that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies," 414 U.S. at 458.

The majority also relies heavily on the fact that "[d]uring the 1940's, 1950's and 1960's there was a widespread, indeed almost general, recognition of implied causes of action for damages under many provisions of the Securities Exchange Act" (majority opinion, p. 23), apparently on the theory that we must infer that Congress in enacting the 1974 Amendments assumed that the courts would as readily imply a cause

of action under the Commodity Exchange Act as they had under the securities laws. That argument has a number of serious flaws.

First, the Supreme Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 2, 13 n.9 (1971), merely acquiesced in the *25-year old* acceptance by the lower courts of an implied private right of action under § 10(b) of the Securities Exchange Act. See *Cannon, supra*, 441 U.S. at 690-93, n.13, which suggests that absent that long-standing prior interpretation the Supreme Court would not have found a private right of action under § 10(b). Since there is no such long-standing history of judicially implied rights under the Commodity Exchange Act, there is simply no basis for inferring that Congress could have assumed that the Court would similarly acquiesce in a private right of action under that Act.

Second, the majority seems to suggest that, because a number of the early securities cases implied a private right of action under the securities laws even though those laws contained express remedies, Congress could assume that the courts would similarly imply a private right of action under the Commodity Exchange Act, which also contains a number of express remedies. That is simply not the case. In *Baird v. Franklin*, 141 F.2d 238, 244-45 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), heavily relied on by the majority, Judge Clark implied a private right of action under the Securities Exchange Act of 1934 because the express remedies were merely punitive and remedial, not compensatory. Section 14 of the Act here, in marked contrast, expressly provides for compensatory damages. Since the securities laws provide for less complete remedies than the Commodity Exchange Act, any analogy between the judicial history

of private rights of action under the securities laws and the Commodity Exchange Act is bound to be of limited relevance.

Third, the majority seeks to distinguish such cases as *Transamerica, supra,* 100 S. Ct. 242, and *Redington,* 442 U.S. 560, on the ground that the 1974 Amendments were passed well after the "great explosion" of judicially recognized private rights of action. The majority, however, ignores the fact that the sections of the Act most heavily relied on by plaintiffs, §§ 4b, 9(b) and 5d, were all enacted in 1923 and 1936, well before any "explosion" in private rights of action. Like the statutes in *Redington* and *Transamerica,* nothing in the legislative history of 1923 or 1936 indicates that Congress intended to create a private right of action under any of the provisions relied on by plaintiffs.

As the law existed prior to 1974, then, the majority's contention that the courts had long recognized a private right of action in favor of these plaintiffs rings hollow. The Supreme Court had never spoken on the subject. No lower federal court had implied a cause of action under § 5(d), § 5a(8), or § 4a. Nor had any court implied a cause of action in favor of one not a customer against a broker-dealer under § 4b. *Deaktor,* which implied a cause of action in favor of a speculator against an exchange under § 9(b), had been decided less than a year before the enactment of the 1974 amendments. This decision, which was never mentioned in the congressional debates as a basis for an implied right of action, is the sole case which could conceivably be relied upon as pre-1974 authority for the proposition advanced by the majority here that Congress "perceived" the private rights of action to be available under the Act in favor of speculators against brokers or

exchanges. It seems most unlikely that Congress had even heard of it, much less relied upon it, in adopting the 1974 amendments. Given the crucial importance of *Deaktor* to the majority's argument, Congress' failure to mention *Deaktor* is highly significant, despite the majority's protestations to the contrary. Absent some indication that Congress knew that a lower court had implied a private right of action in favor of a *speculator against an exchange,* as opposed to its possible knowledge that the court had implied a private right of action in favor of a *customer against his broker under* § *4b,* we simply cannot presume that Congress was aware of *Deaktor,* let alone silently approved of the private right of action it found.

(2) *References in Congress to Private Civil Suits*

The majority next relies upon a few scattered references to private civil actions in the course of hearings by House and Senate Committees with respect to the proposed 1974 amendments. None of these, however, reveal any approval or ratification of such rights. Indeed the evidence is overwhelming to the contrary.

The Senate

Not a single mention of private civil actions is to be found either in the Senate Committee Report with respect to the 1974 bill or on the Senate floor. The only references during the lengthy Senate hearings were those of Senator Clark, Professor Schotland of Georgetown University, and Ms. Judy Jackson, a representative of the Consumer Federation of America, with respect to a provision in a bill introduced by Senator Hart which would have expressly authorized private

civil suits for violations of the Act, S. 2837, § 505(a), and treble damages for willful violations, § 505(b). During the Senate hearings on various proposed bills, including the Hart bill, H.R. 13113 (the already passed House bill), S. 2485 (the Humphrey Bill) and S. 2378 (the McGovern Bill), numerous witnesses specifically addressed the Hart Bill and vigorously urged that the Committee adopt the private right of action provided by it. Commodity Futures Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113, *supra*. Professor Schotland stated that it was "hard to be emphatic enough in favor of [§ 505]" and that "private citizen action for self protection, with full judicial protections, is an enormous step toward helping assure vigorous regulatory action," *id.* at 737, 747. Ms. Judy Jackson noted that neither the Humphrey Bill nor the House bill contained any provision for private civil actions; *id.* at 369. Senator Clark, co-sponsor of the Hart Bill and a member of the Committee, *id.* at 205, spoke in support of private treble damages under the bill. Professor Schotland warned about the need for explicit language approving private rights of action. He stated that if Congress decided to adopt the reparations procedure and place "such virtually unprecedented responsibility and burden in this regulatory body, there should be explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there," *id.* at 737, 747.

Congress rejected the bills. Under a principle of statutory construction expressly endorsed by the Supreme Court in *Amtrak*, *supra*, 414 U.S. at 461, a decision ignored by the majority on this point, where as here Congress has before it a specific proposal to

authorize private rights of action and after full and careful consideration declines to adopt that proposal, its action must not be treated as evidence of intent to approve private rights of action, but rather as an intent to preclude them. Moreover, its action certainly negates the majority's argument that Congress intended *sub silentio* to encourage the lower courts to continue to imply private rights of action.

It is suggested that Congress refused to adopt the private right of action proposals because of its opposition to treble damages. But this was never a position articulated by any lawmakers, who obviously could have eliminated the treble part of the damages with the stroke of a pen and left standing the provision for compensatory damages. The Senate instead chose to reject the proposition that civil monetary damages be recoverable in any action other than a reparations proceeding.[15]

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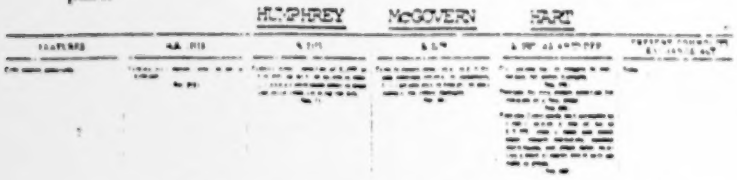
15 Indeed, the Senate had before it a chart comparing the provisions of the four bills under consideration, a chart that omitted any reference to the possibility that private damage suits were available under the existing Act. The comparison chart reads in pertinent part:



Commodity Futures Commission Act: Hearings before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113, *supra*, at 194. Representative Neal Smith introduced a bill in the House, which like Senator McGovern's bill, expressly created an action for treble damages. H.R. 11195, 93d Cong., 1st Sess. § 17 (1973). In 1974, Rep. Smith introduced a similar bill which provided for the reparations procedure which was eventually enacted as § 14, but deleted the provision for treble damages. H.R. 11195, 93d Cong., 2d Sess. (1974).

The House

Turning to the history of the legislation before the House, the latter's Report with respect to the bill makes only two references to an implied private right of action, neither of which evince an intent by Congress to preserve that right. The Report stated that § 5a(8) of the 1968 amendments, which required contract markets to enforce their own rules and which was designed to strengthen self-regulation, had in fact worked to weaken it because, as the Committee was informed,

> "[A]ttorneys to several boards of trade have been advising the boards of trade to reduce—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." H.R. Rep. 93-975, *supra*, at 46.

The Report also stated that one of the reasons for changing the law was

> "(2) Growing difficulties facing exchanges engaged in self regulatory actions as a result of private plaintiffs seeking damages against self-regulatory activities of the markets. As examples, exchanges are sued for actions taken in emergency situations even when the action has been taken at the request or order of the CEA." *Id.* at 48.

Similar language was used by Chairman Poage when he discussed the bill on the House floor, 119 Cong. Rec. 41333 (Dec. 13, 1973).[16] Although it may demonstrate

[16] Chairman Poage also stated on the House floor that "when the Commodity Exchange Act was enacted, courts implied a private

an awareness by key personnel in Congress of lower court decisions implying a cause of action under the Act, it hardly constitutes approval of those decisions. In the first place, the Supreme Court has recently reminded us that "even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 48 U.S.L.W. at 4662. Second, the language merely recognizes a "growing body of opinion" concerning private rights of action. Had Congress intended to approve or encourage that fledgeling body of law, it could and would have indicated as much. Third, rather than extol the virtues of private rights of action, the Report and Chairman Poage emphasized the problems created by private rights and pointedly criticized private suits against exchanges for action taken by them pursuant to order or request of the CEA, now the CFTC.

I find no logical basis for reading this rather explicit language criticizing private rights of action as congressional *approval* of such suits, which is what the majority attempts to do. The majority argues that Congress was not criticizing private rights of action but merely the problems they created and that, desiring private suits to continue, it sought to preclude exchanges from reducing their rules in order to avoid civil liability by empowering the CFTC to require the exchanges to adopt appropriate rules. This sheer speculative extrapolation is not supported by anything

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remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (Dec. 13, 1973). He, of course, erred; a private right of action was not implied by a lower court until 1967.

in the legislative history of the amendments. Indeed it is refuted by the plain language of the House Report.[17]

A more sensible interpretation of the 1974 amendments is that Congress sought to create a uniform comprehensive, cohesive and coherent system of regulation, H.R. Rep. 93-975, *supra* at 1; S. Rep. No. 95-850, *supra*, at 10, 13. Believing that private rights of action were inconsistent with that purpose, it sufficiently increased the powers of the CFTC so that it, rather than private individuals, would be responsible for monitoring the futures trading market.[18]

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17 Chairman Poage himself retreated on the significance of private rights of action. In December, 1973, when he introduced the bill to the House he claimed that the threat of private suits was one reason why the exchanges had cut back on their rules. On April 11, 1974, however, when he presented the bill from his Committee to the House for approval he stated "Regulation by the exchanges is not working as well as it should, and *partly as a result of technicalities of present law* the exchanges may be cutting back on their self-regulatory activities when they should be increasing their efforts in todays markets." 120 Cong. Rec. 10736. (Emphasis added).

Private rights of action hardly constitute "technicalities of present law." Thus, on the day in which Congress' attention was most focused on the Commodity Exchange Act—in fact it was the day the House passed the bill—not one word was mentioned about private rights of action. It strains credulity to suggest, as the majority does, that Congress somehow *relied* on private rights of action when it enacted the 1974 amendments.

18 The majority also relies on the cursory objections to private rights of action raised by one or two representatives of the commodities industry in the House hearings, see, e.g., Commodity Futures Trading Act of 1974: Hearings Before the House Committee on Agriculture on H.R. 11955, 93d Cong., 2d Sess. 249 (1974). The majority reads far too much in the "failure" of Congress to respond to these scattered, vague and unfocused comments. As stated by the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1975):

> "Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 276-277

Intent in Enacting Reparations Procedure and Other Remedies

Both the 1974 Senate and House Reports exhaustively outline the enforcement tools available under the Act as it then stood, together with the additional remedies recommended and finally adopted. S. Rep. No. 1131, 93d Cong., 2d Sess. 11-27 (1974), H.R. Rep. 93-975, *supra*, 33-53. There is not the slightest suggestion that the panoply of enforcement remedies provided by Congress, including reparations proceedings, was intended to supplement private civil rights, as the majority here urges. Indeed, no legislator has ever linked the reparations procedure to private causes of action or mentioned them in the same breath. Though of course it is not defendants' burden to show that Congress intended an express remedy to be exclusive, what little direct evidence there is about the purpose of the reparations procedure suggests that it and the informal arbitration procedures were intended to be exclusive. The House Report, for example, stated that the reparations procedure is

> "intended as a separate remedy designed to supplement the informal 'settlement procedures' contemplated of contract markets. . . . It is the intent of the Committee that those complaints which can be resolved informally and settled without a formal proceeding [the reparations

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(1947); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). This is especially so with regard to the statements of legislative opponents who '[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach.' *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964). See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951)."

> proceeding] through the mechanism contemplated of the contract market . . . should be encouraged to resolve that matter." H.R. Rep. 93-975, *supra*, at 22.
>
> "A customer reparations proceeding before the Commission will be authorized one year after date of enactment for handling customer complaints which arise from violations of the Act, particularly those which result in monetary damages loss to the customer. The commission will have original jurisdiction to consider *all such complaints* which have not been resolved through the informal settlement procedures required of the contract market and registered futures associations under the bill." *Id.* at 3.
>
> *"The provision for this review and settlement of customers accounts should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." Id.* at 83. (Emphasis added). (Letter to the Committee from Department of Agriculture.)

Congress has also explicitly stated that the reparations procedure was created to "offset a suspected industry bias favoring the resolution of customer claims through arbitration," H.R. Rep. No. 1181, 95th Cong., 2d Sess. 91 (1978), thus casting further doubt on the theory that the procedure was intended to supplement private rights of action. Equally revealing is the Senate's belief that where futures associations adopt arbitration procedures, thus relieving contract markets of their duty to adopt similar procedures, "aggrieved customers

. . . would have their choice of seeking resolution of their claims through an association arbitration or reparations proceedings, or a Commission reparations proceeding," S. Rep. No. 95-850, *supra*, at 32. For present purposes it is significant that the "choice" does not include a private right of action.[19]

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19 The few comments relied upon by the majority as evidence of Congress' intent to approve a private right of action are also too vague and abstruse to entitle them to any appreciable weight. First, the majority overstates the significance of Chairman Poage's statement that the act "sets up new consumer protection features." 120 Cong. Rec. 10737 (April 11, 1974). It is not surprising that Chairman Poage used the term "new" to describe the Act's enforcement provisions, including the CFTC's authority to bring suits and levy civil penalties and the reparations procedure, since these provisions were "new." By the use of the term "new" Chairman Poage did not mean that the remedies were "in addition to" or "supplementary" to *implied private right of action*. At most he meant that the remedies were in addition to the express remedies already contained in the Act. Had he intended that these remedies supplement implied private rights of action, he would have said so directly, not through an ambiguous reference to "new" remedies.

Similarly, the majority places unjustified weight on two comments of Senator Talmadge on the Senate floor. On September 9, 1974, while discussing the exclusive jurisdiction provision, § 201 of the House bill, discussed more fully *infra*, he stated:

> "In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws, nor for the Commodity Futures Trading Commission to usurp powers of other regulatory bodies such as those of the Federal Reserve in the area of banking or the Securities and Exchange Commission in the field of securities.
>
> "The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved." 120 Cong. Rec. 3049.

(*Footnote continued*)

Moreover, in the case of contract markets an implied right to recover unlimited damages in a private civil

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The majority also errs in assuming that the first sentence of the second paragraph indicates that Congress approved private rights of action. That sentence refers to the "savings clause" added by Congress to the exclusive jurisdiction provision. Congress added that clause not to approve private rights of action but rather to insure that the exclusive jurisdiction granted to the CFTC would not interfere with federal court jurisdiction over such matters as antitrust suits and enforcement actions taken by other regulatory agencies or with state court jurisdiction over contract and common law claims. Senator Talmadge's later comments about the jurisdictional provision are fully consistent with that view. He further stated in pertinent part:

> "In addition, the conferees wished to make clear that nothing in the Act would supersede or limit the jurisdiction presently conferred on courts of the United States or any state. This Act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the Commodity Futures Trading Commission. Congress was aware that there have been ongoing efforts by various state and federal regulators to prevent some of these abuses. Accordingly, section 412 was included in the bill to make clear that all pending proceedings, including ongoing investigations, as well as court proceedings, should continue unabated by any provision of the Act. This also is necessary in order to prevent the creation of any regulatory gaps, particularly during the time between the adoption of this legislation and the full implementation of its provisions by the Commodity Futures Trading Commission. During the course of our deliberations, we learned, for example, that the SEC has a number of such matters currently under investigation. We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this Act." 120 Cong. Rec. 34997 (Oct. 10, 1974).

Though the majority reads this language as approval of private rights of action, the paragraph read as a whole belies that interpretation. Nothing in the language even remotely refers to private rights of action. Instead, Senator Talmadge was focusing exclusively on the effect of the provision for exclusive jurisdiction on existing court actions brought by various regulatory agencies.

Thus, the second paragraph of Senator Talmadge's September 9, 1974, statement is easily explained. Given the grant of exclusive jurisdiction to the CFTC, it was indeed hoped that the load on the courts would be lightened. Yet, Senator Talmadge was also aware

action against such markets would be inconsistent with express limitations placed by Congress on the amount of civil penalties that might be assessed against a contract market: (1) a limitation of $100,000, and (2) an amount which will not "materially impair the contract market's ability to carry on its operations and duties," § 6b of Act, 7 U.S.C. § 13a.[20]

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that Congress did not intend to relieve the federal courts of the burden of hearing appeals of the reparations proceeding as well as antitrust and regulatory matters or to relieve the state courts of hearing contract and common law matters.

20 Moreover, when Congress in 1978 authorized states to bring actions in the federal courts either in law or equity or both against those who violate the Act, § 6d of the Act, 7 U.S.C. § 13a-2, it expressly exempted contract markets and floor brokers from liability, thus indicating an intent to lodge primary responsibility for the enforcement of the Act with the CFTC and to insulate contract markets and floor brokers from the large damage suits that arise out of private suits, including *parens patriae* suits. The majority argues that contract markets were excluded only because Congress was concerned about off-market abuses. I disagree. While Congress may well have been concerned about off-market abuses, the legislative history clearly demonstrates that Congress exempted contract markets not because of its concern about off-contract market abuses but because it desired the CFTC to retain exclusive jurisdiction over those markets in order to guarantee national uniformity in the development of standards governing commodity futures trading. Contrary to the majority's suggestion (footnote 35) there is a difference between the award of damages under § 14 and an award of damages in a private civil suit. In enacting the former, Congress may well have intended the CFTC in the first instance to develop some guidelines for the award of damages which would minimize the likelihood of inconsistent awards popping up around the country, as often happens in private civil suits.

The House Report, for example, stated "the Commission should continue to have sole authority for the creation of a nationally uniform body of standards governing activities relating to commodity futures trading," H.R. Rep. 95-1181, *supra*, at 14, and that with respect to § 6d "The power to enforce the requirements of the Act with respect to the organized exchanges remains solely with the Commission." *Id.* at 14. The Report concluded:

"The Committee views the creation of these rights of action in the States as a necessary supplement to the Commission's enforce-

Congress' complete failure to approve, much less to authorize, private rights of action when it exhaustively

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ment activities. In the event of a State suit, the Commission could intervene in the action or institute its own administrative disciplinary proceeding, or both, as would be the case if the Commission had initiated the action in Federal court." *Id.* at 14.

To insure that such actions would not proceed without the opportunity for CFTC involvement, Congress specifically required the States upon instituting any suit under § 6d to notify the CFTC and gave the CFTC the right to intervene. § 6d(2). The importance to Congress of assuring a nationally uniform body of standards is further emphasized by its refusal to permit the States to bring actions in State courts under State statutes identical to the Commodity Exchange Act. "The committee was concerned that, despite safeguards in the Act, the possibility existed that in time there would be separate bodies of State court decisions among the various States that would cause confusion and disruption among the regulated persons." *Id.* at 16.

The legislative history in the Senate, moreover, reinforces the view that Congress desired the CFTC to retain exclusive jurisdiction over contract markets. The Senate Report reads with respect to § 6d:

> "This authority is subject to the qualification that such State actions may not be brought against a contract market or floor broker designated or registered as such with the Commission. The intent of the section is to provide States with the tools to combat fraudulent and other unlawful activity directed at their residents. Plenary authority to register, regulate, and, discipline the contract markets and the 'locals' whose activities are generally of the character of pit trading rather than customer contact is reserved to the Commission." S. Rep. No. 95-850, *supra* at 27.

So concerned was the Senate Committee that the "body of decisional law developed under this section [§ 6d] would be coherent and consistent with national policy" that it required any State proceeding under § 6d to obtain approval from the CFTC, *id.* at 26, though the Senate later amended that section, requiring instead the notification procedure mentioned just above. Confirming the view that § 6d was a specific and limited exception to the general rule of CFTC exclusive jurisdiction, Senator Bellmon explained on the Senate floor why contract markets and brokers were excluded: "The Federal preemption doctrine has merit regarding the regulation of commodity markets and brokers. However, there is no justification for tying the hands of the States when they wish to stop fraudulent practices occurring within their borders." 124 Cong. Rec. S10561 (July 12, 1978). Contrary to the majority's suggestion (opinion, p. 63), the identity of the plaintiff in such action is quite relevant. In

analyzed, overhauled and amended the enforcement provisions of the Act refutes the majority's claim that it somehow or other affirmatively intended such rights to continue as a supplement to the battery of enforcement weapons provided by it. Had it desired or intended this, the logical and natural procedure would have been for it to say so. *SEC v. Sloan*, 436 U.S. 103, 122 (1977). No court has ever imposed on Congress the contrary duty, which the majority urges, of expressly stating that the remedies provided by it are exclusive.

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order to assure national uniformity, Congress permitted only the CTFC or the States, under limited circumstances, to bring suit, not private individuals.

In light of Congress' cautious and careful approach to *parens patriae* suits under § 6d, including the insulation of contract markets from those suits, it would be anomalous for Congress to have approved private suits against contract markets and floor brokers. It is unlikely that Congress would have required States to notify CFTC of any action brought under § 6d while at the same time permitting private suits to blossom all over the country without the CFTC's knowledge. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 419, 420-21 n.13 (1974) ("anomalous for Congress to have centralized SEC suits [against the SIPC] for the apparent convenience of the SIPC while exposing the corporation to substantively identical suits by investors 'in any court, State or Federal' ").

The majority's reliance on the statement of Senator Leahy to the effect that contract markets were exempted from § 6d, in part because of the deterrent effect of private suits, 124 Cong. Rec. S16527 (Sept. 28, 1978), is misplaced. Since Congress was well aware by 1978 that the lower courts had begun to deny private rights of action under the Act, 124 Cong. Rec. S10537 (July 12, 1978) (Statement of Senator Huddleston), Senator Leahy's statement must be characterized as a hope and a prayer. Moreover, the explanation rings hollow since it would apply equally well to those traders subject to *parens patriae* suits who, under the view adopted by Senator Leahy at least, were also subject to private causes of action. Had Congress in fact believed that traders and contract markets were subject to private rights of action, it would have been far less likely to enact a *parens patriae* provision subjecting traders to suit by the States. Nor would it have been as concerned as it was about exempting contract markets from those suits.

Jurisdictional Provisions

The majority next contends that the "savings clause" incorporated into the jurisdictional provision, § 2 of the Act, 7 U.S.C. § 2 (§ 201 in the enacted bill), explicitly preserves the private right of action implied by the lower courts. Section 201 originated in H.R. 13113 and as passed by the House it read:

> "Provided, That the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market; And provided further, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States."

During the Senate hearings Rep. Rodino, Chairman of the House Committee on the Judiciary, criticized the provision not on the grounds that it might eliminate private rights of action but rather because the provision might be interpreted as eliminating the jurisdiction of state courts over contract claims and the jurisdiction of federal courts over antitrust claims and suits seeking review of administrative hearings. His comments are

set forth in full in the margin.[21] He accordingly suggested the addition of a proviso to the effect that federal courts should not be ousted of their jurisdiction. As a result the following proviso was enacted:

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21 Chairman Rodino's statement reads in relevant part:

"This double proviso could be construed to raise a question of federal pre-emption of the commodity futures industry and, therefore, unnecessarily raises a question of federal-State relationships. Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption. . . .

"In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. The first proviso confers 'exclusive jurisdiction' on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provision: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Arguably, too, if jurisdiction of federal courts were to be withdrawn also, the Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.

"If it appears advisable to retain rather than to delete the double proviso of Section 201(B) of H.R. 13113, it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions. In this regard, the second proviso could be amended to provide:

"And provided further, that Nothing therein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities and on federal court. . . ." Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S 2578, S. 2837 and H.R. 13113, *supra*, at 259-60.

> *And provided further,* That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

Other witnesses reiterated Chairman Rodino's criticisms without any reference to private rights of action. Mr. Keith Clearwater, Deputy Assistant Attorney General, Dept. of Justice, for example, stated: "There are two problems with this language. It could be interpreted to deprive the Federal Courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce contract and commercial law rights." Commodity Futures Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113, *supra,* at 663. See Statements of James T. Halverson, Director of Bureau of Competition, Federal Trade Commission, *id.* at 667-68, and Statement of Glenn Willet Clark, Professor of Law, Drake University Law School, *id.* at 683-84.

The majority's contention that the "savings clause" explicitly preserves a private right of action rests solely on the comment of Senator Clark, while urging the Senate to authorize private treble damage suits, that "Unfortunately, the House bill does not authorize them,

but section 201 of that bill may prohibit all court actions. The staff has said that this was done inadvertently and they hope it can be corrected in the Senate." *Id.* at 205.

This "passing reference" by a "single legislator" is a slim reed on which to find congressional approval of a private right of action. *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 48 U.S.L.W. at 4662; *Piper v. Chris-Craft Industries, Inc., supra,* 430 U.S. at 31-32; *Chrysler Corp. v. Brown, supra,* 441 U.S. at 311; see *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 204 n.24 (1976). Senator Clark's concern that the House provision might prohibit "court actions" could well have been intended to refer to actions arising out of commodity contract claims. Moreover, applying the principles of *Chrysler Corp.,* his statement must be considered with the Reports of both Houses and the statements of other witnesses and Congressmen, all of which refute the majority's contention that there is a link between the jurisdictional provision of § 201 and Congress' attitude toward private rights of action.

Given the reasons expressly advanced by Chairman Rodino and given that no witness indicated that the revision of § 201 was intended to preserve or even affect any private rights of action in federal courts, the evidence is overwhelming that Congress simply took up the task of correcting the problem noted by Chairman Rodino and others and had no intention of approving a private damage action. Had Congress intended to preserve jurisdiction of the federal courts over private suits it could easily have said so, as it did in § 6c when it granted federal jurisdiction to hear CFTC-initiated injunctive suits, and in § 14(f) when it provided for such jurisdiction to enforce judgments arising out of reparations proceedings.

The Act does not have any counterpart to the jurisdictional provision of § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which affirmatively grants to federal courts exclusive jurisdiction of violations of the Act and of its regulations and authorizes civil suits to be brought in the district where the defendant is found or resides. In any event the "savings clause" here, which was directed exclusively to jurisdictional matters, could not preserve private damage actions, since jurisdictional provisions cannot create such rights, *Redington, supra,* 442 U.S. at 577. "The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [Act] which they seek to enforce, not in the jurisdictional provision." *Id.* at 577 (citing cases).

The 1978 Amendments

Finally, although subsequent legislation is of very limited weight in ascertaining Congress' intent in enacting earlier laws, *Transamerica, supra,* 100 S. Ct. at 248 n.13, the 1978 amendments are revealing. First, Congress did not provide expressly for a private right of action against merchants and exchanges despite its awareness that the lower courts had begun to deny private rights of action under the Act,[22] a situation

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22 The following cases, in addition to Judge MacMahon's opinion in this case, 470 F. Supp. 1256, have refused to imply a private cause of action under the Commodity Exchange Act: *Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976), *affd. on other grounds*, 571 F.2d 437 (8th Cir. 1978); *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 477 (D. Ohio 1976); *Bartels v. International Commodites Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Berman v. Bache Halsey Stuart, Shields, Inc.*, 467 F. Supp. 311 (S.D. Ohio 1979); *Alkan v. Rosenthal & Co.*, CCH Comm. Fut. L. Rep. Par. 20,797 (S.D. Ohio 1979); *Liang v. Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979); *Fischer v. Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979); *Stone v. Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980).

which Sen. Huddleston on the floor of the Senate deemed "unfortunate." 124 Cong. Rec. 10537 (July 12, 1978). Instead, Congress proposed to alleviate the heavy burden on the reparations procedure caused by the failure of lower courts to imply private rights of action not by amending the Act to allow private suits, as we would expect if it had approved of private suits, but rather by eliminating the hearing requirement for reparations claims under $5,000. § 14(b), 7 U.S.C. § 18(b).

The failure of Congress to amend the Act is particularly significant in light of its awareness by that time of the Supreme Court's recent but well publicized adoption of somewhat stricter principles governing the implication of private causes of action. See *Amtrak*, 414 U.S. 453 (1974); *Cort v. Ash*, 422 U.S. 66 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[23]

Second, Congress in 1978 received testimony from the states that they were uncertain, in light of various adverse court decisions, about their ability to bring *parens patriae* suits for violations of the Act and to enforce their own contract and consumer fraud statutes. In sharp contrast to its 1974 refusal to authorize private suits, Congress expressly empowered the states to bring suits in federal courts to enjoin violations of the Act or to obtain monetary damages,

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[23] The majority responds that Congress' omission is not significant, reasoning that Congress could not have been aware in 1978 of the Supreme Court's retreat from a liberal view of implied rights of action). But, as the Court recognized in *Cannon, supra*, 442 U.S. at 698, *Cort v. Ash* and other cases decided prior to 1978 had signaled a stricter approach.

§ 6d, 7 U.S.C. § 13a-2, and expressly confirmed the ability of the states to enforce their contract and consumer fraud law. § 6d(5), 7 U.S.C. § 13a-2(5). Quite apart from the fact that Congress' express exemption of contract markets and floor brokers from liability under § 6d suggests a desire to insulate those participants from private damage liability,[24] the adoption of § 6d is a clear indication that "Congress knew how to confer a private right of action when it wished to do so." *Transamerica, supra,* 100 S. Ct. 248 at n.13. Moreover, Congress recognized that express authorization for such suits was necessary if a right under the Act to institute such litigation was to exist:

> "Section 12 specifically authorizes the States to investigate or prosecute in a civil action violations of the Act. . . . Any such action must be brought in the proper Federal district court, and the Commission is given the right to intervene in the action as a party. *This is a new right since States currently have no such express authority under the Act."* H.R. Rep. No. 95-1181, *supra,* at 28.

This statement is strong evidence that when Congress intended to create a right of action under the Act it did so expressly, not by implication.[25]

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24 See *supra* note 20.

25 Equally telling is the complete absence of any mention of a private right of action in the exhaustive Senate and House Committee Reports on the 1978 amendments, which purported to list all of the private remedies available under the Act. S. Rep. No. 95-850, *supra,* at 12-13; H.R. Rep. No. 95-1181, *supra,* (158 pages discussing the Act, its history and its enforcement provisions without a mention of private rights of action). This conspicuous omission suggests, of course, that Congress did not believe a private right of action to be available.

The Theory that Congressional Silence Amounts to Congressional Approval

Lacking any substantial support in the language or legislative history of the Act that Congress affirmatively approved private rights of action, the majority's position boils down to the theory that Congress must have been aware generally of a few lower federal court decisions implying a private right under the Act as it stood prior to 1974 and therefore found express approval of private rights unnecessary. But bearing in mind that "[i]mplying a private cause of action on the basis of Congressional silence is a hazardous enterprise, at best," *Redington, supra,* 442 U.S. at 571, any leap from congressional silence to congressional approval must be made cautiously, if at all. Moreover, it is inappropriate to rely on the presumption asserted by the majority where, as here, Congress has expressly created a number of remedies which may reasonably be viewed as exclusive and where, if Congress intended to adopt a prior judicial interpretation providing for an additional remedy, it would have said so. Finally, the body of earlier lower federal court decisional law provides a wholly inadequate basis, either in terms of relevance, weight, period of existence, or notoriety, for such an inference.

In *T.I.M.E. v. United States, supra,* 359 U.S. 464, the Court expressly rejected the position advanced by the majority here. There a shipper of goods contended that it had a private cause of action under the Motor Carrier Act to recover unreasonable rates charged by a carrier in violation of the Act. After rejecting the contention that the Act granted a private right of action, in part because, as here, Congress specifically declined to enact a proposed cause of action, the Court rejected the claim

that the Act must be read as preserving a pre-existing common-law or judicially implied right of action.

> "The Government is able to point to only two cases in addition to the present ones, in the 24 years since passage of the Motor Carrier Act, in which courts have appeared to assume that the issue of reasonableness of past motor carrier rates was litigable, and in neither of these cases was the question given other than the most cursory attention. Under these circumstances the issue before us cannot fairly be said to be foreclosed by long-standing interpretation and understanding.
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> "We are told that Congress has long been aware that the Commission was of the view that a common-law action for recovery of unreasonable rates paid to a motor carrier, with referral to the Commission of the issue of unreasonableness, would lie, and that its failure to legislate in derogation of this view implied an approval and acceptance of it. But it appears that each time the Commission's views in this regard were communicated to committees of Congress, it was in connection with a request by the Commission for legislation which would have given to shippers a cause of action under the statute and granted to the Commission the authority to award reparations, and each time that request was rejected. . . . *[W]e do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.*" 359 U.S. at 478. (Emphasis added).

The few decisions relied upon by the majority are consistent with the foregoing, since they involved exceptionally long periods of continuous construction and not, as here, an interpretation by a lower federal court, the Seventh Circuit in *Deaktor*, less than a year old. In *Blue Chip Stamps v. Manor Drug Stores, supra,* 421 U.S. at 733, the Court found that a *24-year old* acceptance by the lower courts of an interpretation of §10(b) limiting the cause of action to purchasers of securities, coupled with the failure of Congress to reject that interpretation, despite the Securities and Exchange Commission's repeated urging, "argues significantly in favor of acceptance" of that interpretation. In *Cannon, supra,* 441 U.S. 677, the Court, in implying a cause of action under Title IX of the Education Amendments of 1972, noted that Congress intended to create remedies under Title IX similar to those available under Title VI and found that Congress understood that the courts had implied a right of action for plaintiffs under Title VI. The Court, however, specifically disclaimed reliance on the presumption used by the majority here—that the private right of action must be presumed to exist unless expressly repealed by Congress—and instead rested its decision on what it considered to be Congress' affirmative intent to create a private right of action. *Id.* at 699.

Similarly in *SEC v. Sloan, supra,* 436 U.S. 103, the Court rejected the argument that Congress should be presumed to have approved a long-standing administrative construction of a statute despite Congress' re-enactment of the statute without disapproval of the interpretation and the fact that on at least one occasion the relevant Senate Committee indicated that it understood and approved the interpretation. The Court

noted that "we are extremely reluctant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this." *Id.* at 121. The Court concluded that if Congress intended to approve the prior interpretation it could have and would have said so. This principle applies with equal force in the present case.

The cases cited by the majority are not to the contrary. In *Lorillard v. Pons*, 434 U.S. 575 (1978), the Court found that Congress, in enacting the Age Discrimination Employment Act (ADEA) and in incorporating a number of provisions from the Fair Labor Standards Act (FLSA), intended to adopt the judicial construction of those provisions. The Court noted that because Congress exhibited a detailed knowledge of the FLSA provisions and their interpretations and a willingness to depart from those interpretations with which it disagreed, it was fair to presume that, but for the changes made in the FLSA provisions, Congress intended to incorporate fully all other remedies and interpretations of the FLSA. This is quite different from the situation in the present case where the references to the prior judicial interpretation are few and far between in the legislative history and where Congress dos not exhibit detailed knowledge of that interpretation.

Reliance on *Georgia v. United States*, 411 U.S. 526 (1978), is similarly misplaced. The Court found congressional acquiescence in a prior Supreme Court

decision to be persuasive only after noting that the decision was repeatedly discussed by members of Congress. Indeed, discussion of the decision took up approximately 73 pages in the House Hearings and 10 in the Senate, *id.* at 533 n.5.[26]

All of these authorities are a far cry from the inference as to congressional intent which we are asked to draw in this case. As in *SEC v. Sloan*, reliance is placed on a few scattered undefinitive and conclusory references in thousands of pages of legislative history rather than upon repeated detailed reference to any identified Supreme Court decisions, such as existed in *Georgia*. Unlike the 25-year history of interpretation of § 10(b), with which the Supreme Court was faced in *Superintendent of Insurance* and *Blue Chip Stamps*, we find a brief line of lower court decisions, none of which are relevant to the issues before us except one, decided *only one year* before the 1974 amendments, *Deaktor*, knowledge of which by Congress cannot be presumed. This hardly constitutes a long-standing and well-recognized prior judicial interpretation sufficient to invoke the dubious presumption relied on by the majority here. The silence of the 1975 Congress when it amended the Securities Exchange Act (see majority

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26 The other cases cited by the majority are likewise easily distinguishable. In the first place, none of them involves private rights of action and we have been instructed by the Supreme Court to go slow in inferring that Congress by its silence intended to approve a private right of action. *Redington, supra*, 442 U.S. at 571. Second, the cases all involve situations where the prior judicial interpretation is far more longstanding and pervasive than the one year old history of *Deaktor* here, see, e.g., *Van Franken v. Helvering*, 115 F.2d 709 (2d Cir. 1940), *cert. denied*, 313 U.S. 585 (1941), and *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5 (1930), or where, unlike the situation here, there have been numerous specific references in the legislative history to the prior interpretation. *Bennett v. Panama Canal Co.*, 475 F.2d 1280 (D.C. Cir. 1973).

opinion, *supra*, p. 33) in the face of *Supreme Court decisions* (e.g., *Superintendent of Insurance* and *Blue Chip Stamps* upholding implied rights of action) is quite different from silence in the face of *one lower court decision (Deaktor)*, of which it may not even have had knowledge. No court has yet found a private cause of action based on §§ 5d, 5a(8) or 4a of the Act, which are invoked on this appeal.

Lastly, since it is abundantly clear that the few pre-1974 decisions were erroneous, being based on the theory of tort rather than congressional intent, it is unreasonable to suppose that Congress, absent a Supreme Court ruling, intended to compound the error by tacitly giving effect to them. Cf. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978); *SEC v. Sloan, supra*, 436 U.S. at 116 (holding that the interpretations of an administrative agency as to its statutory authorization is entitled to deference only when thoroughly and soundly reasoned). By 1974 the Supreme Court with its decision in *Amtrak* had signaled a somewhat stricter approach to the implication of private rights of action, putting Congress on notice that the basic principles of construction by which private rights were to be implied was not yet finally settled.

In the last analysis the majority substitutes sheer speculation based on unsupportable presumptions for reasonable evidence of Congress' contrary intent. The issue was squarely presented to Congress in 1974 but it failed to approve an express right of action much less indicate in a long legislative history any approval of an implied one. "We are not obliged to indulge Congress in its refusal to confront the hard questions of private rights of action," *Cannon, supra*, 441 U.S. at 743 n.14

(Powell, J., dissenting). Under these circumstances, absent some expression of approval by Congress, formal or informal, I believe we should not imply an intent on its part to create an implied right of action. Under these circumstances, creation of a private right rests with Congress, not the judiciary.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2375 (LFM), 76 Civ. 2554 (LFM),
76 Civ. 2571 (LFM), 76 Civ. 2594 (LFM)

NATIONAL SUPER SPUDS, INC. et al.,

Plaintiffs,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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76 Civ. 2648 (LFM)

INCOMCO,

Plaintiff,

—against

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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76 Civ. 3210 (LFM)

HOWARD BERENSON,

Plaintiff,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

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76 Civ. 4350 (LFM)

NEIL LEIST et al.,

Plaintiffs,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

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76 Civ. 5200 (LFM)

DEXTER RICHARDS,

Plaintiff,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

APPEARANCES:

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—and—

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MacMahon, *District Judge.*

Defendants, the New York Mercantile Exchange (the "Exchange"), Richard Levine ("Levine"), Howard Gabler ("Gabler"), Alfred Pennisi ("Pennisi"), Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson"), move under Rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, or, in the alternative, under Rule 56(b), Fed.R.Civ.P., for partial summary judgment dismissing all or part of the complaints against them in these related actions.[1] Since

[1] The Exchange moves in the following actions: *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571, 76 Civ. 2594 (the "consolidated class ac-

all parties have submitted factual material outside the pleadings, we treat the motions as motions for partial summary judgment.

These actions arise out of the much publicized default in May 1976 of Maine potato futures contracts,[2] when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country. The primary claim in these actions is that the default was caused by certain defendants' price manipulation.

In order to understand these motions, a basic understanding of the commodities futures industry is essential. A commodity future is a contract for the future delivery of a certain commodity. Except for price, all the terms of the contracts for a given commodity traded on an exchange are standardized and, thus, the contracts are fungible. The actual trading of futures is done by futures commission merchants and floor brokers, both of whom must be registered with the Commodities Futures Trading Commission

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tions"); *Incomco* v. *New York Mercantile Exchange*, 76 Civ. 2648; and *Leist* v. *Simplot*, 76 Civ. 4350.

Levine, Gabler and Pennisi move in *Leist* v. *Simplot*, 76 Civ. 4350.

Clayton moves in the consolidated class actions and in *Leist* v. *Simplot*, 76 Civ. 4350.

Heinold and Thomson move in the consolidated class actions, in *Berenson* v. *Simplot*, 76 Civ. 3210, and in *Leist* v. *Simplot*, 76 Civ. 4350.

The motions of the Exchange, Levine, Clayton, Heinold and Thomson in *Richards* v. *New York Mercantile Exchange*, 76 Civ. 5200, are denied as moot because this action was discontinued after these motions were filed.

The motions of the Exchange and Clayton in *Berenson* v. *Simplot*, 76 Civ. 3210, are also denied as moot because this action has been discontinued as to the Exchange and Clayton.

[2] See N.Y. Times, May 26, 1976, at 1, col. 1.

(the "CFTC").[3] Additionally, trading may take place only on exchanges which have complied with certain statutory requirements and have been designed as "contract markets" by the CFTC.[4]

A seller of a futures contract is, in the language of the trade, in a "short" position, that is, he is obligated to deliver the commodity at a future date in return for the right to receive the purchase price. Conversely, a buyer of a futures contract is said to be in a "long" position, that is, he is obligated to pay the purchase price in return for the right to receive the commodity. As a practical matter, however, physical delivery of the commodity is made on only a small fraction of the futures contracts traded on the nation's exchanges. Most of the trades are made by speculators who have no intention of delivering or receiving the actual commodity. As the last day of trading in a particular contract approaches, a speculator in a short position (a seller) will cover his obligation to deliver by buying a contract. Similarly, a speculator in a long position (a buyer) will cover his obligation to pay by selling a contract.[5]

Plaintiffs, traders and a dealer in potatoes, were buyers holding long positions in May 1976 Maine potato futures contracts. They allege that Clayton, Heinold and Thomson, futures commission merchants, conspired with certain of their customers to manipulate and depress the price of the May contract by selling an illegally large number of May contracts, thereby causing plaintiffs to sell their contracts and potatoes at an artificially depressed price.

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[3] 7 U.S.C. §§ 6d, 6e, 6f.

[4] 7 U.S.C. §§ 6, 7.

[5] The commodities futures industry is described in more detail in S. Angrist, Sensible Speculating in Commodities (1972) and S. Kroll & I. Shishko, Commodity Futures Market Guide (1973).

Plaintiffs contend that the actions of Clayton, Heinold and Thomson violated the Commodities Exchange Act[6] (the "Act"), various regulations promulgated thereunder,[7] and Sections 1 and 2 of the Sherman Act.[8] Plaintiffs also contend that the Exchange, a designated contract market, and its officers, Levine, Gabler and Pennisi, are liable to them for failure to take steps to prevent the downward price manipulation by the other defendants, and that the Exchange conspired with the other defendants to manipulate the price.

Specifically, plaintiffs allege that the Exchange and its officers failed to report and concealed violations of the Act and the regulations promulgated thereunder; that the Exchange and its officers violated the Act by failing to enforce its own rules, the Act and the CFTC's regulations; and that the Exchange violated Sections 1 and 2 of the Sherman Act.

Implied Right of Action

All moving defendants contend that they are entitled to partial summary judgment because there is no private right of action against them under the Act. Concededly, such a right of action existed prior to 1974,[9] but, in that

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[6] 7 U.S.C. § 1 et seq.

[7] Plaintiffs also allege violations of the Exchange's rules. Because the obligation to obey these rules arises under the CFTC's regulations, we consider these claims as alleging violations of the CFTC's regulations.

[8] 15 U.S.C. §§ 1, 2.

[9] *E.g., Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

year, the Act was amended extensively,[10] and the question before us is whether the private right of action has survived the 1974 amendments to the Act.

Although a number of other district courts have considered this question, there is no clear consensus on the answer.[11] This difference of opinion and the importance of the question to the future course of these actions compel us to resolve the question ourselves.

Under *Cort* v. *Ash*,[12] four factors are relevant in determining whether a private right of action may be implied under a federal statute which does not expressly provide for one:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is,

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[10] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (codified at 7 U.S.C. § 1 et seq.). The Act was further amended in 1978. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (codified at 7 U.S.C. § 1 et seq.).

[11] Nine cases have stated that a private right of action exists under the Act: *R.J. Hereley & Son* v. *Stotler & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,773 (N.D. Ill. 1979); *Smith* v. *Grover*, No. 77 C 2297 (N.D. Ill. Feb. 2, 1979); *Gravois* v. *Fairchild, Arabatzis & Smith, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 20,706 (E.D. La. 1978); *Berenson* v. *Madda Trading Co.*, No. 78-544 (D.D.C. Oct. 30, 1978); *Hoffmayer* v. *Dean Witter & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,694 (N.D. Cal. 1978); *Kelley* v. *Carr*, 442 F. Supp. 346 (W.D. Mich. 1977); *Bache Halsey Stuart, Inc.* v. *French*, 425 F. Supp. 1231 (D.D.C. 1977); *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976); *Milani* v. *Conticommodity Serv., Inc.*, 462 F. Supp. 405 (N.D. Cal. 1976).

Five cases have stated that no private right of action exists under the Act: *Alkan* v. *Rosenthal & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,797 (S.D. Ohio 1979); *Berman* v. *Bache Halsey Stuart, Shields, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 20,796 (S.D. Ohio 1979); *Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (D. Ohio 1976); *Arkoosh* v. *Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976), *aff'd on other grounds*, 571 F.2d 437 (8th Cir. 1978).

[12] 422 U.S. 66 (1975).

> does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? . . ." [13]

There can be no question that plaintiffs, investors in the commodities market and a dealer in potatoes, are within the class "for whose especial benefit the statute was enacted." As Senator Dole stated, the primary purposes of the 1974 amendments to the Act were "[to protect] against manipulation of markets and to protect any individual who desires to participate in futures market trading." [14] Additionally, the Act itself states that price manipulation and unreasonable fluctuations in price "are detrimental to . . . persons handling the commodities." [15]

Thus, we find that the first element of the *Cort* test is satisfied.

The second element of the *Cort* test, congressional intent, is more troublesome. The 1974 amendments to the Act established an administrative procedure under which "[a]ny person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to

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[13] *Id.* at 78 (citations omitted).

[14] 120 Cong. Rec.-Senate 30466 (1974) (remarks of Sen. Dole); accord 120 Cong. Rec.-Senate 34998-99 (1974) (remarks of Sen. Clark). See also *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977).

[15] 7 U.S.C. § 5.

be registered under . . . this title may"[16] commence an administrative proceeding before the CFTC to recover reparations. Judgments resulting from these reparation proceedings are subject to judicial review by the courts of appeal[17] and may be enforced in the district courts.[18]

The 1974 amendments also give the CFTC plenary power over futures commission merchants and contract markets. The CFTC may suspend or revoke the registration of a futures commission merchant or the designation of a contract market.[19] The CFTC is also authorized to issue cease and desist orders against contract markets[20] and to assess civil penalties of up to $100,000 against futures commission merchants and contract markets.[21] Finally, the CFTC or the Attorney General, at the request of the CFTC, is authorized to bring an action in the district courts against futures commission merchants and contract markets for a restraining order, an injunction or a writ of mandamus to compel compliance with the Act and the regulations thereunder.[22]

We believe that under the maxim of *"expressio unius est exclusio alterius,"*[23] the establishment of administrative

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[16] 7 U.S.C. § 18(a).

[17] 7 U.S.C. § 18(g).

[18] 7 U.S.C. § 18(f).

[19] 7 U.S.C. §§ 7b, 9.

[20] 7 U.S.C. § 13a.

[21] 7 U.S.C. §§ 9, 13a.

[22] 7 U.S.C. § 13a-1. The 1978 amendments to the Act added a provision by which a state may bring an action under the Act on behalf of its citizens. 7 U.S.C. § 13a-2.

[23] Expression of one thing is the exclusion of another. See *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Redington* v. *Touche Ross & Co.*, 592 F.2d 617, 629-30 (2d Cir.) (Mulligan, J., dissenting), *cert. granted*, 47 U.S.L.W. 3368 (U.S. Nov. 27, 1978) (No. 78-309).

reparation proceedings and the plenary grant of disciplinary and regulatory power to the CFTC evidences a congressional intent to deny a private right of action under the Act. This conclusion is reinforced by the fact that Congress was informed of the need for a private right of action under the Act[24] but rejected a bill which would have expressly established such a right of action.[25]

Thus, we conclude that Congress did not intend that there be a private right of action under the Act.

The third element of the *Cort* test, whether the implication of a private right of action would be consistent with the underlying purposes of the Act, also weighs against the implication of such a right. As applied by the Supreme Court, this element of the *Cort* test is satisfied when the implication of a private right of action is necessary in order to further the purposes of the statute in question.[26]

Contract markets, such as the Exchange, are not registered persons under the Act, and, thus, they are exempt from the administrative reparation proceeding established by the Act. The CFTC alone has the right to assess a monetary civil penalty against a contract market, and the Act imposes two limitations on the amount of the civil penalty which may be assessed against a contract market. First, there is an overall limitation of $100,000.[27] Second,

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[24] Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 3, 737, 746 (1974) (testimony of Prof. Roy A. Schotland).

[25] S. 2837, 93d Cong., 1st Sess. § 505(a) (1973). This bill provided for actual damages for non-wilful violations of the Act and treble damages for wilful violations.

[26] *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 39-40 (1977); *Cort* v. *Ash*, *supra*, 422 U.S. at 84; *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964); Comment, Implying Private Causes of Action from Federal Statutes, 17 Boston Col. Indus. & Com. L. Rev. 53, 69 (1975).

[27] 7 U.S.C. § 13a.

the CFTC is required to consider "whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties." [28] We believe that both of these limitations evidence a congressional intent to limit the potential monetary exposure of contract markets. Since neither of these limitations would be present in private actions against contract markets, the implication of a right of action against contract markets would be inconsistent with the manifest intent of Congress to limit the potential monetary liability of contract markets.

Additionally, the implication of a private right of action against futures commission merchants would not be consistent with the Act because it is not necessary to further the purposes of the Act. Since there is no dispute that futures commission merchants, such as Clayton, Heinold and Thomson, are subject to the administrative reparation proceedings mentioned above,[29] there is plainly no necessity to imply a right of action to remedy injuries which are fully compensable in administrative proceedings.

Thus, we conclude that implication of a private right of action under the Act would not be consistent with the underlying purposes of the Act.

The fourth element of the *Cort* test, whether the implication of a private right would infringe on an area of state concern, favors the implication of such a right since it is well settled that the regulation of commodity futures trading is essentially a matter of federal concern.[30]

Thus, our application of the *Cort* test leads us to conclude that there is no private right of action under the

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[28] *Id.*

[29] See text accompanying notes 16-18, *supra.*

[30] See *e.g. Smith* v. *Grover, supra,* slip op. at 18-19; *Gravois* v. *Fairchild, Arabatzis & Smith, Inc., supra,* Comm. Fut. L. Rep. (CCH) ¶ 20,706 at 22,873.

Act because the two critical elements of the test,[31] congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right.

Plaintiffs contend that the implication of a private right of action under the Act is compelled by those cases which have implied private rights of action under the Securities Exchange Act of 1934.[32] Although we agree with plaintiffs that there are some similarities between the commodity futures industry and the securities industry, we find that the respective statutory schemes are significantly different. First, the Securities Exchange Act does not provide any administrative remedy to defrauded investors as does the Commodities Exchange Act. Second, the Securities Exchange Act does not grant the SEC the same plenary powers that the Commodities Exchange Act gives the CFTC.[33] Finally, the Commodities Exchange Act contains no counterpart to the Securities Exchange Act's specific grant of jurisdiction to the district courts over violations of that Act,[34] which the Supreme Court found of

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[31] See *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers, supra,* 414 U.S. at 457-58.

[32] 15 U.S.C. § 78a et seq.

[33] The SEC's power over brokers, dealers and securities exchanges is limited to suspension or revocation of their registration. 15 U.S.C. §§ 78o(b)(4), 78s(h). The SEC may also seek to enjoin brokers, dealers and securities exchanges from violating the Security Exchange Act. 15 U.S.C. § 78u.

[34] 15 U.S.C. § 78aa provides, in pertinent part, that:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

Although 7 U.S.C. § 13a-2(2) closely resembles the language quoted above, its reach is expressly limited to actions brought by state attorneys general.

critical importance when it implied private rights of action under that Act.[35]

Plaintiffs also argue that the CFTC interprets the Act as allowing private rights of action[36] and that the CFTC's interpretation is entitled to "'great deference.'"[37] However, as the Supreme Court has recently stated, the administrative deference rule is not applicable where the "narrow legal issue is one particularly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants."[38]

Finally, we note that the Supreme Court's recent decision in *Cannon* v. *University of Chicago*[39] is readily distinguishable from this case. In *Cannon*, the Supreme Court implied a private right of action for a victim of alleged sex discrimination under Title IX of the Education Amendments of 1972,[40] despite the existence of an administrative procedure to enforce those amendments. However, the only administrative remedy under Title IX is the termination of federal grants to educational institutions which discriminate on the basis of sex. Thus, the Supreme Court found that Title IX provided no private administrative remedy to victims of sex discrimination.[41] In contrast,

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[35] *Securities Investor Protection Corp.* v. *Barbour*, *supra*, 421 U.S. at 424; *J.I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 430-31.

[36] Amicus Curiae Brief of the Commodities Futures Trading Commission submitted in *Smith* v. *Grover*, *supra*.

[37] *United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977) (citations omitted).

[38] *Piper* v. *Chris-Craft Indus., Inc.*, *supra*, 430 U.S. at 41 n.27.

[39] 47 U.S.L.W. 4549 (U.S. May 14, 1979) (No. 77-926).

[40] 20 U.S.C. §§ 1681-1686.

[41] See 47 U.S.L.W. at 4556.

the reparations procedure available under the Commodities Exchange Act provides a remedy directly for the benefit of private parties injured by violations. Thus, unlike *Cannon,* the implication of a right of action here is not necessary to provide a plenary remedy to the intended beneficiaries of the Act.

Cannon is also distinguishable for a second reason. In *Cannon,* the Supreme Court noted that Title IX was enacted in 1972 when the Court had been rather liberal in finding implied rights of action. The Court found that Congress expected Title IX to be interpreted in accordance with that liberal view.[42] The Commodities Exchange Act, on the other hand, was reconsidered by Congress as recently as last year when the Supreme Court had retreated from its liberal view toward implied rights of action.[43] Yet, in enacting the 1978 amendments to the Act, Congress again failed to add a section expressly providing for a private right of action despite knowledge that a number of district courts had held that the private right of action previously implied did not survive the 1974 amendments.[44] *Cannon* teaches that the failure of Congress to provide for a private right of action must be viewed in light of the judicial attitude toward such rights at the time of enactment. In light of that teaching, the failure of Congress to provide for a private right of action in the 1978 amendments evidences an intent to deny such a right.

Thus, we conclude that there is no private right of action against futures commission merchants and contract markets under the Act. Since there is no private right of action under the Act, it necessarily follows that there is no private

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[42] *Id.* at 4554.

[43] *Id.*

[44] 124 Cong. Rec.-Senate 10537 (remarks of Sen. Huddleston).

right of action under the regulations promulgated pursuant to the Act.[45]

ANTITRUST CLAIMS

Clayton and Heinold also move for summary judgment on the antitrust claims, asserting that there is no genuine issue of fact that they did not intend to manipulate the price of May 1976 Maine potato futures contracts.

A party seeking summary judgment bears the burden of demonstrating the absence of any genuine issue of fact,[46] even when the motion is unopposed.[47] Clayton and Heinold have submitted excerpts of deposition testimony given by certain of their employees. Although this testimony does tend to show that Clayton and Heinold lacked the intent required for a violation of the Sherman Act, it is neither conclusive nor sufficiently clear to allow us to conclude that there is no genuine issue of fact. Clayton's employee, Delbridge, admitted that Clayton took no steps to investigate its clients' ability to deliver despite their large short position, and Heinold's vice-president, Klopfenstein, admitted that Heinold did not take the steps that it normally would have taken to ensure that its short customers could deliver. Given the elusive nature of intent and its significance to an antitrust violation,[48] we cannot say that there is no issue of fact regarding Clayton's and Heinold's knowledge and intent.[49]

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[45] *Crane Co.* v. *American Standard, Inc.*, No. 77-7517, slip op. at 2019 n.11 (2d Cir. Apr. 4, 1979).

[46] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

[47] *Id.* at 160.

[48] See *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978).

[49] See *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) ("[S]ummary judgment is likely to be inappropriate when the issues concern intent.").

Accordingly:

1. There being no just reason for delay, the Clerk of the court is directed, pursuant to Rule 54(b), Fed.R.Civ.P., to enter final judgment:

A. In favor of the Exchange on its motions for partial summary judgment on the sixth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange,* 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; the first and fourth claims of the complaint in *Incomco* v. *New York Mercantile Exchange,* 76 Civ. 2648; and the fourth claim of the complaint in *Leist* v. *Simplot,* 76 Civ. 4350;

B. In favor of Levine, Gabler and Pennisi on their motion for summary judgment on the fourth claim of the complaint in *Leist* v. *Simplot,* 76 Civ. 4350;

C. In favor of Clayton on its motions for partial summary judgment on the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange,* 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; and the first claim of the complaint in *Leist* v. *Simplot,* 76 Civ. 4350;

D. In favor of Heinold and Thomson on their motions for partial summary judgment on the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange,* 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; the first claim of the complaint in *Leist* v. *Simplot,* 76 Civ. 4350; and the second claim of the complaint in *Berenson* v. *Simplot,* 76 Civ. 3210, to the extent that it asserts a claim under the Act.

2. Clayton's and Heinold's motions for summary judgment in their favor on all other claims against them are denied in all respects.

So ordered.

Dated: New York, N.Y.
May 29, 1979

/s/ LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July, one thousand nine hundred and eighty.

79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & Co., et al.,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES INC., *et al.,*

Defendants-Appellees.

Present:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. AMALYA L. KEARSE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. Daniel Fusaro, *Clerk*

By: /s/ Arthur Heller
Arthur Heller
Deputy Clerk

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

PRESENT:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. AMALYA L. KEARSE,

Circuit Judges.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, *et al.*,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

THE NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO., & HAROLD COLLINS,

Defendants,

THE NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

79-7482

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

HEINOLD COMMODITIES, INC., and THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendants-appellees New York Mercantile Exchange, Levine, Gabler & Pennisi,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

Order Denying Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

THE NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO., & HAROLD COLLINS,

Defendants,

THE NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

79-7482

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

HEINOLD COMMODITIES, INC., and THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by

counsel for the defendants-appellees New York Mercantile Exchange, Levine, Gabler & Pennisi,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ WILFRED FEINBERG
WILFRED FEINBERG
Chief Judge

Order Staying Issuance of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of September, one thousand nine hundred and eighty.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

v.

JOHN RICHARD SIMPLOT, JR., SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, *et al.*,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the New York Mercantile Exchange, et al., appellees, by notice of motion dated September 16, 1980, to stay issuance of the mandate pending application to the

Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) F.R.A.P. be and it hereby granted.

/s/ HENRY J. FRIENDLY
HENRY J. FRIENDLY

/s/ WALTER R. MANSFIELD
WALTER R. MANSFIELD

/s/ AMALYA L. KEARSE
AMALYA L. KEARSE

Circuit Judges.

Order Continuing Stay of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of October, one thousand nine hundred and eighty.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,
Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, *et al.*,
Defendants,

and

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,
Defendants-Appellees.

INCOMCO,
Plaintiffs-Appellants,

—against—

WAYNE COUNTY PRODUCE CO. and HAROLD COLLINS,
Defendants,

and

NEW YORK MERCANTILE EXCHANGE,
Defendant-Appellee.

NATIONAL SUPER SPUDS, INC., *et al.*,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, *et al.*,

Defendants,

and

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellees, N.Y. Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi, by notice of motion dated October 17, 1980 to continue stay of mandate to and including December 9, 1980 pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) Federal Rules of Appellate Procedure be and it hereby is granted to the extent of extending such time until November 11, 1980, and is otherwise denied.

/s/ HENRY J. FRIENDLY
HENRY J. FRIENDLY

/s/ WALTER R. MANSFIELD
WALTER R. MANSFIELD

/s/ AMALYA L. KEARSE
AMALYA L. KEARSE

Circuit Judges.

Provisions of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*

Section 4b, 7 U.S.C. § 6b

§ 6b. *Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities.*

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to

any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Section 5, 7 U.S.C. § 7

§ 7. *Designation of board of trade as "contract market"; conditions and requirements.*

The Commission is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts

of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture or the Commission for the purpose: *Provided,* That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Commission.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Commission may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Commission, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Commission may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said

transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and shall at all times be open to the inspection of any representative of the Commission or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant

to the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter.

(g) When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest.

Section 5a, 7 U.S.C. § 7a

§ 7a. *Duties of contract markets.*

Each contract market shall—

By-laws, rules, etc.; furnishing copies to Commission

(1) Promptly furnish the Commission copies of all by-laws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

Access for inspection of books and records

(2) keep all books, records, minutes, and journals or proceedings of such contract market, and its governing board, committees, subsidiaries, and affiliates in a manner that will clearly describe all matters discussed by such contract market, governing board, committees, subsidiaries and affiliates and reveal any action taken in such matters, and allow inspection at all times by any authorized representative of the Commission or United States Department of Justice of all such books, records, minutes, and journals of proceedings. Such books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct;

Books and records of warehouses; keeping and inspection

(3) require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Commission may prescribe. Such books and records shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and such books, records, and warehouses shall be open at all times to inspection by any representative of the Commission or United States Department of Justice;

Periods of delivery; provisions for

(4) when so directed by order of the Commission, provide for a period, after trading in contracts of sale of any commodity for future delivery in a delivery month has ceased, during which contracts of sale of such commodity for future delivery in such month may be satisfied by the delivery of the actual cash commodity. Whenever, after due notice and opportunity for hearing, the commission finds that provision for such a period of delivery for any one or more commodities or markets would prevent or tend to prevent "squeezes" and market congestion endangering price stability, he shall, by order, require such period of delivery (which shall be not less than three nor more than ten business days) applicable to such commodities and markets as it finds will prevent or tend to prevent such "squeezes" and market congestion: *Provided, however,* That such order shall not apply to then existing contracts;

Notice of date of intended delivery

(5) require the party making delivery of any commodity on any contract of sale of such commodity for future de-

livery to furnish the party obligated under the contract to accept delivery, written notice of the date of delivery at least one business day prior to such date of delivery. Whenever, after due notice and opportunity for hearing, the Commission finds that the giving of longer notice of delivery is necessary to prevent or diminish unfair practices in trading in any one or more commodities or markets, it shall by order require such longer notice of delivery (which shall be not more than ten business days) applicable to such commodities and markets as he finds will prevent or diminish such unfair practices: *Provided, however,* That such order shall not apply to then existing contracts;

United States standards; conformity of grades to

(6) require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards shall have been officially promulgated and adopted by the Commission;

Warehouse receipts as satisfaction of future contract

(7) require that receipts issued under the United States Warehouse Act shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any State or enjoys other or different privileges than under State law: *Provided, however,* That such receipts shall be for the kind, quality, and quantity of commodity specified in such contract and that the warehouse in which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other ware-

houses as to location, accessibility, and suitability for warehousing and delivery purposes: *And provided further*, That this paragraph shall apply only to futures contracts for those commodities which may be delivered from a warehouse subject to the United States Warehouse Act;

Enforcement of bylaws, etc. relating to trading requirements

(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission;

Enforcement of bylaws, etc. providing minimum financial standards and related reporting requirements

(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for further commission merchants who are members of such contract market, and which have been approved by the Commission.

Delivery points

(10) permit the delivery of any commodity, on contracts of sale thereof for future delivery, of such grade or grades, at such point or points and at such quality and locational price differentials as will tend to prevent or diminish price

manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce. If the Commission after investigation finds that the rules and regulations adopted by a contract market permitting delivery of any commodity on contracts of sale thereof for future delivery, do not accomplish the objectives of this paragraph, then the Commission shall notify the contract market of its finding and afford the contract market an opportunity to make appropriate changes in such rules and regulations. If the contract market within seventy-five days of such notification fails to make the changes which in the opinion of the Commission are necessary to accomplish the objectives of this paragraph, then the Commission after granting the contract market an opportunity to be heard, may change or supplement such rules and regulations of the contract market to achieve the above objectives: *Provided,* That any order issued under this paragraph shall not apply to contracts of sale for future delivery in any months in which contracts are currently outstanding and open: *And provided further,* That no requirement for an additional delivery point or points shall be promulgated following hearings until the contract market affected has had notice and opportunity to file exceptions to the proposed order determining the location and number of such delivery point or points;

Settlement of customers' claims and grievances

(11) provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any

claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or a floor broker; and

Commission approval of bylaws, rules, regulations, and resolutions

(12) except as otherwise provided in this paragraph, submit to the Commission for its approval all bylaws, rules, regulations, and resolutions made or issued by such contract market, or by the governing board thereof or any committee thereof which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements except those relating to the setting of levels of margin. At least thirty days before approving any such bylaws, rules, regulations, and resolutions of major economic significance, as determined by the Commission, the Commission shall publish in the Federal Register such bylaws, rules, regulations, and resolutions. The Commission shall give interested persons an opportunity to participate in the approval process through the submission of written data, views, or arguments. The determination by the Commission whether any such bylaws, rules, regulations, or resolutions are of major economic significance shall be final and not subject to judicial review. The Commission shall approve, within thirty days of their receipt (or within sixty days of their receipt if the Commission determines them to be of major economic significance) unless the Commission notifies the contract market of its inability to make such determination within such period of time, such bylaws, rules, regulations, and resolutions upon a determination that such bylaws, rules, regulations, and resolutions are not

in violation of the provisions of this chapter or the regulations of the Commission and thereafter the Commission shall disapprove, after appropriate notice and opportunity for hearing, any bylaw, rule, regulation, or resolution which the Commission finds at any time is in violation of the provisions of this chapter or the regulations of the Commission. The Commission shall specify the terms and conditions under which a contract market may, in an emergency, as defined by the Commission, adopt a temporary rule dealing with trading requirements without prior Commission approval. In the event of such an emergency, as defined by the Commission, requiring immediate action, the contract market by a two-thirds vote of its governing board may place into immediate effect without prior Commission approval a temporary rule dealing with such emergency if it notifies the Commission of such action with a complete explanation of the emergency involved. The Commission may adopt a regulation exempting enumerated types of contract market operational and administrative rules from the requirement that they be submitted to the Commission for its approval.

Section 5b, 7 U.S.C. §7b

§ 7b. *Suspension or revocation of designation as "contract market"*

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a "contract market" in accordance with the procedure and subject to the judicial review provided in section 8 of this title.

Section 6, 7 U.S.C. § 8

§ 8. *Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals*

Any board of trade desiring to be designated a "contract market" shall make application to the Commission for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing on the record before the Commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The Commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing on the record: *Provided,* That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the Commission such board of trade appeals to the court of appeals for the circuit in which it has its principal place of business, by

filing with the clerk of such court a written petition praying that the order of the Commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The testimony and evidence taken or submitted before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order. No such order of the Commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the Commission.

Section 6b, 7 U.S.C. § 13a

§ 13a. *Nonenforcement of rules of government or other violations; cease and desist orders; fines and penalties; imprisonment; misdemeanor; separate offenses.*

If any contract market is not enforcing or has not enenforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has vi-

olated any of the provisions of this chapter or any of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing on the record and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and assess a civil penalty of not more than $100,000 for each such violation. If such contract market, director, officer, agent, or employee, after the entry of such a cease and desist order and the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such cease and desist order continues shall be deemed a separate offense. If the offending contract market or other person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court. In determining the amount of the money penalty assessed under this section, the Commission shall consider the appropriateness of such penalty to the net worth of the offending person and the gravity of the offense, and in the case of a contract market shall further consider whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties.

Section 6c, 7 U.S.C. § 13a-1

§ 13a-1. *Action to enjoin or restrain violations; compliance; writs and orders; jurisdiction and venue; process.*

Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided,* that no restraining order or injunction for violation of the provisions of this chapter shall be issued *ex parte* by said court. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States also shall have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provision of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take such action as is necessary to remove the danger of violation of this chapter or any such rule, regulation, or order: *Provided,* That no such writ of mandamus, or order affording like relief, shall be issued *ex parte.* Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district

where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found. In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action. Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments.

Section 6d, 7 U.S.C. § 13a-2

§ 13a-2. *Jurisdiction of States.*

(1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a state may designate, that the interests of the residents of that State has been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, or floor broker) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this chapter, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

(2) The district courts of the United States, the United States court of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this chapter or any rule, regulation, or order of the

Commission thereunder, or to obtain damages or other relief with respect thereto. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that the defendant take such action as is necessary to remove the danger of violation of this chapter or of any such rule, regulation, or order. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Immediately upon instituting any such suit or act, the State shall serve written notice thereof upon the Commission and provide the Commission with a copy of its complaint, and the Commission shall have the right to (A) intervene in the suit or action and, upon doing so, shall be heard on all matters arising therein, and (B) file petitions for appeal.

(4) Any suit or action brought under this Section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(5) For purposes of bringing any suit or action under this section, nothing in this chapter shall prevent the attorney general, the administrator of the State securities laws, or other duly authorized State officials from exercising the powers conferred on them by the laws of such State to conduct investigations or to administer oaths or affirma-

tions or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) For purposes of this section, "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(7) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general, civil or criminal antifraud statute of such State.

Section 9(b), 7 U.S.C. § 13(b)

§ 13(b). *Price manipulation; cornering; postal or interstate dissemination of false or misleading information affecting price of commodity in interstate commerce; felony*

(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any applica-

tion or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

Section 14, 7 U.S.C. § 18

§ 18. *Complaints against registered persons—Petition.*

(a) Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

Investigation and hearing

(b) If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: *Provided,* That in complaints wherein the amount claimed as damages does not

exceed the sum of $5,000 a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

Determination

(c) After opportunity for hearing on complaints where the damages claimed exceed the sum of $5,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $5,000 not requiring hearing as provided herein, the Commission shall determine whether or not the respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

Bond requirement when complainant is nonresident; waiver

(d) In case a complaint is made by a nonresident of the United States, the complaint shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: *Provided,* That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

Reparations

(e) If after a hearing on a complaint made by any person under subsection (a) of this section, or without hearing as provided in subsections (b) and (c) of this section, or

upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

Enforcement of reparation award

(f) If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is

located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. Subject to the right of appeal under subsection (g) of this section, an order of the Commission awarding reparations shall be final and conclusive.

Review

(g) Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be

allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

Penalty

(h) Unless the registrant against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order, he shall be prohibited from trading on all contract markets and his registration shall be suspended automatically at the expiration of such fifteen-day period until he shows to the satisfaction of the Commission that he has paid the amount therein specified with interest thereon to date of payment: *Provided,* That if on appeal the appellee prevails or if the appeal is dismissed the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

Effective date

(i) The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided,* That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period.

Supreme Court, U. S.
FILED
JAN 2 1981
MICHAEL RODAK, JR., CLERK

No. 80-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, *et al.*,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 31, 1980

In the

Supreme Court of the United States

October Term, 1980

No. 80-757

New York Mercantile Exchange, *et al.*,

Petitioners,

v.

Neil Leist, Philip Smith and Incomo,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The consolidated petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit in Docket Nos. 80-757,895,936 present the question of whether there is a private cause of action for damages under various sections of the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (the "Act"). In *Leist* v. *Simplot*, 2 CCH Comm. Fut.L.Rep. ¶ 21,051 (2d Cir. 1980) the court held by a divided panel that there was such a cause of action. In a related action, *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), which is also the subject of a pending petition before this Court in Docket No. 80-203, the United States Court of Appeals for the Sixth Circuit by a divided panel had earlier held that there was a private cause of action.

We are filing this supplemental brief to bring to the Court's attention the decision of the United States Court of Appeals for the Fifth Circuit rendered on December 16,

1980 in *John Rivers* v. *Rosenthal & Co.* (No. 79-1313) where the court unanimously held that there was no private cause of action under various sections of the Act. A copy of the opinion is set forth in a separately bound appendix submitted jointly by us and by the petitioners in Docket Nos. 80-895 and 80-936.

Thus there now exists a direct conflict between courts of appeals on this important question of federal law. For this additional reason, the writ should issue.

Respectfully submitted,

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December 31, 1980

Nos. 80-757,895,936 (Consolidated)

Supreme Court, U. S.
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JAN 2 1981
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, *et al.*,

Petitioners,

v.

NEIL LEIST, *et al.*,

Respondents.

JOINT APPENDIX TO SUPPLEMENTAL BRIEFS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1313

JOHN RIVERS and TOM LAMB (Dan P. Rivers, as Executor of the will of John Rivers, substituted in place and stead of John Rivers, deceased),

Plaintiffs-Appellees,

—versus—

ROSENTHAL & COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

(December 16, 1980)

Before:

KRAVITCH, HENDERSON and REAVLEY,

Circuit Judges.

REAVLEY, *Circuit Judge:*

This appeal presents a single legal question: whether there exists an implied private right of action under the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1-24, as revised in 1974, to redress commodity futures customers for damages sustained from their brokers' violations of the antifraud provisions and broker registration requirements

of that Act, 7 U.S.C. §§ 6b,[1] 6k,[2] and the corresponding reg-

[1] 7 U.S.C. § 6b provides, in pertinent part:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person;

* * *

[2] 7 U.S.C. § 6k provides, in pertinent part:

(1) It shall be unlawful for any person to be associated with any futures commission merchant or with any agent of a futures commission merchant as a partner, officer, or employee (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged, unless such person shall have registered, under this chapter, with the Commission and such registration shall not have expired nor been suspended (and the period of suspension has not expired) or revoked, and it shall be unlawful for any futures commission merchant or any agent

ulations, 17 C.F.R. §§ 32.3, 32.9 (1979).[3] Relying upon such an implied right of action, as well as fraud and fiduciary violation grounds with which we are not here concerned, John Rivers and Tom Lamb brought suit below against Rosenthal & Company and an agent[4] in its Memphis, Tennessee office, Carl M. Tipton. Rivers and Lamb allege that in 1976 and 1977 they suffered substantial losses in commodity futures transactions conceived and carried out in their behalf by Tipton in violation of the antifraud and registration provisions noted above.

Arguing that no such private right of action exists, Rosenthal moved to dismiss under Fed. R. Civ. P. 12(b)(6), those counts of the complaint based on the alleged violations of the CEA. The district court determined that an implied right of action was available to Rivers and Lamb and denied the motion to dismiss. Upon the appropriate recommendation of the district court that the denial of this motion entailed a controlling and controversial question of law the immediate resolution of which would materially advance the ultimate termination of litigation, this court accepted the interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We now reverse, holding that no implied private

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> of a futures commission merchant to permit such a person to become or remain associated with him in any such capacity if such futures commission merchant or agent knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired) or revoked: *Provided,* That any individual who is registered as a floor broker or futures commission merchant (and such registration is not suspended or revoked) need not also register under these provisions.
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> • • •

[3] *See also* 7 U.S.C. §§ 6b, 12a(5) (providing authority for promulgation of regulations and proscribing their contravention).

[4] 7 U.S.C. § 4 imposes upon principals such as Rosenthal the responsibility for the acts and omissions of their agents.

right of action is available to plaintiffs-appellees, Rivers and Lamb.[5]

I. Background

The question we face here has already received considerable judicial attention since the 1974 amendments to the CEA. Within the past half year the Second and Sixth Circuits have ruled that an implied private right of action does exist under the CEA, but both decisions were rendered by split panels over very forceful dissents. *Leist* v. *Simplot*, —— F.2d —— (2d Cir. [slip op. nos. 79-7402, -7464, -7482, July 8,] 1980) (per Friendly, J., finding right of action for contraventions of various sections, such as 7 U.S.C. §§ 6b, 7(d), 7a(8), 13(b), proscribing market manipulation, fraud, and dilatory behavior by exchanges; Mansfield, J. dissenting); *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith*, 622 F.2d 216 (6th Cir. 1980), *petition for cert. filed*, 48 U.S.L.W. 3053 (U.S. Aug. 9, 1980) (No. 80-203) (private action for violation of antifraud provisions such as § 6(b).[6] Since 1974 numerous district courts also

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[5] The named parties are joined on this appeal by the Commodity Futures Trading Commission ("CFTC") and Drexel Burnham, Lambert, Inc., as *amici curiae*. The CFTC appears in favor of the implied right, Drexel in opposition. The court is indebted to them for their scholarly contributions.

[6] As of this writing, these are the only other two circuits to have engaged in a reasoned analysis of the existence of an implied private right of action under the CEA as constituted following the 1974 revision. *But see Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F.2d 129, 133 n.7 (8th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 79 (1979) (noting summarily in dictum that "[s]uch actions are well recognized."); *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 & n.8 (7th Cir. 1977) (similar perfunctory assertion). This court has not faced the issue heretofore, although twice since 1974 it has expressly reserved decision on the existence of a cause of action under the Act as constituted *prior* to the 1974 amendments. *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1067 & n.14 (5th Cir. 1979); *Moody* v. *Bache & Co., Inc.*, 570 F.2d 523, 528-29 (5th Cir. 1978).

have faced the issue, with a slight majority of these courts finding that a cause of action is available under various provisions.[7]

In light of the extensive examination and exposition of the question already appearing in or destined for the federal judicial reports—particularly the exhaustive and scholarly opinions of Judges Friendly and Mansfield for the Second Circuit in *Leist* v. *Simplot*—we would serve no purpose by again retracing in minute detail either the historical or legislative background of the 1974 amendment to the CEA. We do make a brief foray into the background of the Act and its judicial treatment to set the stage for discussion of the contest.

A. *Prior to 1974*

The present federal statutory scheme for regulating the trading of commodity futures traces its lineage back to The Futures Trading Act, ch. 86, 42 Stat. 187 (1921), and its successor, The Grain Futures Act, ch. 369, 42 Stat. 998

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[7] *Compare, e.g., Grayson* v. *ContiCommodity Serv. Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,033 (D.D.C. May 23, 1980) (action pursuant to 7 U.S.C. § 6b); *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, 487 F. Supp. 416 (S.D.N.Y. 1980) (§ 6b); *Alken* v. *Lerner*, 485 F.Supp. 871 (D.N.J. 1980) (§ 6b); *Smith* v. *Groover*, 468 F.Supp. 105 (N.D. Ill. 1979) (§§ 6b, 13a, 13b); *Poplar Grove Planting & Refining Co.* v. *Bache Halsey Stuart, Inc.*, 465 F.Supp. 585, 589-90 (M.D. La. 1979) (§§ 6b, 6d), all finding implied private rights of action, *with, e.g., Stone* v. *Saxon Windsor Group Ltd.*, 485 F.Supp. 1212 (N.D. Ill. 1980) (construing §§ 6c(b), (c)); *Sunnyside Eggs, Inc.* v. *Urner Barry Publ., Inc.*, No. 78-1661A (N.D. Ga. Mar. 28, 1980) (§ 13b); *Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979) (§ 6b); *Bartels* v. *International Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977) (§ 6b), all ruling that no private cause of action exists under the CEA as amended in 1974. *See also Hofmayer* v. *Dean Witter & Co., Inc.*, 459 F.Supp. 733 (N.D. Cal. 1978) (finding right of action under fraud provisions, §§ 6b and 6o, but not for violation of registration provisions, §§ 6k and 6n (as alleged here), or for violation of exchange rules).

(1922). These acts, limited to grain futures, inaugurated the pattern of restricting futures trading to designated "contract markets," *i.e.* central exchanges subject to government supervision and charged with adopting measures to prevent price manipulation.[8] Although these acts empowered the government to take some steps against individual price manipulations, in practice almost total reliance for the regulation of such activities rested with the individual exchanges.

In 1936, Congress significantly expanded the scope of federal regulation of the futures trading industry and retitled the legislation the "Commodity Exchange Act," ch. 545, 49 Stat. 1491 (1936). Under this Act, regulatory coverage went beyond grain futures to include other specified agricultural commodities. Additional substantive regulatory provisions were enacted, including an antifraud provision, § 4b, 49 Stat. 1493, in essentially the same form as that in the present codification, 7 U.S.C. § 6b, which forms one of the bases of this action. Greater direct government control of market abuses by individual traders also was established by the addition of criminal sanctions for violation of the proscription against price manipulation as well as fines and penalties for the transgressions of other provisions and by the vesting of broader powers of direct

[8] The mechanism through which the 1921 Act was to accomplish its systemization of the national futures trade—*i.e.* by the levying of a tax on all grain futures contracts traded other than on licensed contract markets—soon was declared an unconstitutional exercise of the taxing power. *Hill* v. *Wallace*, 259 U.S. 44 (1922). Almost immediately, however, Congress redrafted the substantive provisions, substituted for the offending tax section a simple proscription of all futures dealings other than on licensed contract markets, and reenacted the whole pursuant to its power to regulate interstate commerce as The Grain Futures Act. The Supreme Court upheld the new Act as constitutional in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923).

supervision and enforcement in the Department of Agriculture.

Notwithstanding this beefing up of the federal regulatory scheme, the principal emphasis and essential philosophy of the legislation remained one of industry self-regulation through the contract markets. *Curran* v. *Merrill Lynch*, 622 F.2d at 231; *Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1214. Despite similar, though less expansive, amendments in 1968 that increased the sanctions and penalties under the CEA and added several new substantive requirements not pertinent here, Pub. L. 90-258, 82 Stat. 26 (1968), the basic approach of industry self-regulation continued until the drastic revision of the CEA in 1974.

Significantly for our purposes, the relatively limited role expressly legislated for the federal government to play in the active enforcement of this expanding regulatory scheme during the period 1922-1974 consisted of punitive or coercive mechanisms such as fines, removal of licenses, or criminal penalties—all sanctions against transgressors. Congress did not expressly provide for any federal judicial or administrative forum or remedy through which those injured due to fraud or other violations of the acts or regulations could seek redress from those transgressors.

By at least 1967 with the decision in *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. 440, 447 (N.D. Ill. 1967), however, the courts began to fill that void by finding an implied private right of action under the CEA. *See Leist* v. *Simplot*, —— F.2d at ——, [slip op. at 4076] (intimating that private actions may have been maintained prior to and in greater number than is indicated by only the published decisions). In fact, all courts that decided the issue held unanimously that such a private cause of action was available under the CEA as constituted ***prior to***

1974. See, e.g., Deaktor v. *L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir. 1973), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973) (cause of action under 7 U.S.C. § 13b); *Booth* v. *Peavey Co. Community Services*, 430 F.2d 132, 133 (8th Cir. 1970) (§ 6(d)); *Arnold* v. *Bache & Co., Inc.*, 377 F.Supp. 61, 65 (M.D. Pa. 1973) (§ 6b); *McCurnin* v. *Kohlmeyer & Co.*, 340 F.Supp. 1338, 1343 (E.D. La. 1972), *aff'd per curiam*, 477 F.2d 113 (5th Cir. 1973). *But see Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1067 & n.14 (5th Cir. 1979) (suggesting existence of pre-1974 cause of action an open question upon remand); *Moody* v. *Bache & Co.*, 570 F.2d 523, 528-29 (5th Cir. 1978). Moreover—although the correctness of these decisions is dubious when measured against the present wisdom for determining the existence of implied rights of action, *see, e.g., Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 100 S.Ct. 242 (1979) ("TAMA") and Part II, *infra*—this course of allowing the victims of violations to take the initiative and hail their trespassing tormentors before the courts was basically consistent with that era's fundamental approach of relying principally upon the self-policing of the futures trades by those involved in it.

B. *1974 Amendments*

By the early 1970's, however, the vastly increased volume, scope and complexity of futures trading and the apparent inability of the individual exchanges to cope coherently and satisfactorily with these geometrically expanding problems compelled a reevaluation of that basic self-regulatory approach. S. Rep. No. 850, 95th Cong., 2d Sess. 8-10, *reprinted* in [1978] U.S. Code Cong. & Ad. News 2087, 2096-98; S. Rep. No. 1131, 93d Cong., 2d Sess., *reprinted* in [1974] U.S. Code Cong. & Ad. News 5843, 5858-59. The product of this reevaluation was the Commodity

Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 ("CFTCA"). Different in *character* from even the significant amendments of 1936 and 1968, the CFTCA "signalled a dramatic shift from the theory of exchange self-regulation," upon which federal futures trading legislation had been premised up to that point, *Leist* v. *Simplot*, —— F.2d at ——, [slip op. at 4075], and proposed in its place "a comprehensive regulatory structure" creating a coherent uniform system of federal control over the entirety of the national futures trading industry. H.R. Rep. No. 975, 93d Cong., 2d Sess. 1. Consequently, rather than comprising mere patchwork additions as had all prior amendatory schemes, the CFTCA actually constituted "the first *complete overhaul* of the Commodity Exchange Act since its inception." *Id.* (emphasis added).

The CFTCA dramatically expanded federal regulatory coverage beyond agricultural products to encompass futures trading in several categories of goods and services not previously regulated. *See* 7 U.S.C. §§ 2, 6c(a) & (b). The most significant changes pertinent to our consideration here, however, came in the total revamping of the regulatory oversight and enforcement systems designed to effectuate the shift in policy to a uniform, comprehensive federal control over the industry.

The focal point of this shift was the creation of the Commodity Futures Trading Commission ("CFTC"), a strong regulatory body, vested with exclusive jurisdiction over futures trading, 7 U.S.C. § 2, that was to be the keystone of the new comprehensive federal regulatory structure. Federal oversight responsibility over the daily functioning of the industry was greatly expanded through the CFTC. For example, the Commission was empowered to designate and to prescribe certain terms of operation for

licensed contract markets, as well as to review all regulations and bylaws of these markets and to disapprove, alter or supplement those rules insofar as it deemed necessary. *See, e.g.*, 7 U.S.C. § 12a(7). Further, the activities of certain classes of individual traders were for the first time brought under the federal eye by the requirement that they register periodically with the CFTC. *See, e.g.*, 7 U.S.C. § 6k (one of the provisions forming the basis of plaintiffs' complaint here, requiring registration of associates of futures commission merchants).

Central to our concern are those provisions elaborately overhauling the comparatively limited enforcement scheme extant under the old law in order to assure compliance with the new oversight provisions above, and the many substantive standards of conduct that had been carried forward into the new statutory framework virtually unchanged (such as the antifraud provision, § 6b, involved here). Consistent with the shift in philosophy toward affirmative federal responsibility, this renovated enforcement system was greatly strengthened relative to prior law both by the enhancement of some old tools and by the addition of several potent new ones. *See* S. Rep. No. 850, *supra* at 11-12. For example, maximum civil penalties and fines assessable against individual violators and against contract markets that failed to enforce their rules were drastically increased from $10,000 to $100,000 per episode. *See, e.g.*, 7 U.S.C. §§ 13a, 13b. The Commission also was newly empowered, for instance, to sue in federal court for injunctive relief whenever it appeared that an individual or contract market had engaged, was engaging, or was about to engage in conduct violating the Act or regulations, 7 U.S.C. § 13a-1, as well as to conduct disciplinary proceedings against exchange members, 7 U.S.C. § 12c, and revoke or suspend the registration or trading priv-

ileges of any such individual, 7 U.S.C. §§ 6n(6), 9, or contract market, 7 U.S.C. § 7b.

Most importantly, the 1974 Act for the first time expressly provided the means for persons injured by violations of the Act to seek redress from those responsible. First, each designated contract market was required to provide an arbitration or other informal procedure for the settlement of customers' claims and grievances involving less than $15,000.[9] 7 U.S.C. § 7a(11). Second, the Act established an administrative reparations procedure pursuant to which complaints might be filed with the CFTC against virtually any futures trading professional required to be registered under the Act. 7 U.S.C. § 18. The CFTC is obliged to investigate such complaints and, if warranted in the Commission's opinion, to allow the complainant to proceed against the alleged culprit before an administrative law judge either by hearing or by depositions or certified statements of facts, depending upon the size of the claim. 7 U.S.C. § 18(b). The administrative law judge in turn is authorized to rule upon the merits of the claim and to order payment of damages necessary to compensate the injured individual. *See, e.g., Gordon* v. *Shearson Hayden Stone, Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,016 (April 10, 1980). An order of payment is enforceable in federal district court, and the Commission's ruling on the merits of a claim may be appealed by either party to the court of appeals in the designated circuit. 7 U.S.C. § 18(f), (g).[10]

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[9] As indicated by this provision, the role of the individual exchanges, particularly in the enforcement vein, was not totally extinguished despite the shift in policy toward a more uniform, government-controlled regulatory system. *See also* 7 U.S.C. § 21 (enabling provision for the creation of registered futures associations formed to engage in broad industry self-regulation).

[10] The CEA was significantly amended again in 1978. Futures Trading Act of 1978, Pub. L. 95-405, 92 Stat. 865. These altera-

The question we face is whether an implied judicial private right of action also was meant to be included among the panoply of express enforcement tools in this "comprehensive regulatory structure" erected by the 1974 revision. We conclude that it was not.

II. Defining the Inquiry

As indicated by our recent opinions in *United States* v. *Capeletti Bros., Inc.*, 621 F.2d 1309, 1313 (5th Cir. 1980) and *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074, 1078 (5th Cir.), *petition for cert. filed*, 48 U.S.L.W. 3769 (no. 79-1810, May 14, 1980), this court continues to employ the factors articulated in *Cort* v. *Ash*, 422 U.S. 66 (1975), as a guide to determining whether a cause of action should be inferred from any particular statutory scheme. In *Cort* the Supreme Court identified four factors it considered particularly relevant to this inquiry:

> "First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one . . . ? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff . . . ? And

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tions took the form primarily of adjustments to the framework erected in 1974. The most significant changes for our purposes were the modification of the reparations procedure to allow full-fledged hearings only for claims greater than $5,000 (as opposed to $2,500 in the original enactment), 7 U.S.C. § 18(b)&(c), and the addition of a new provision expressly allowing the attorneys general of the various states to lodge damage actions in federal courts on behalf of their residents against alleged violators of the Act, 7 U.S.C. § 13a-2. These amendments and their legislative history will be discussed more fully as they appear pertinent to the analysis below.

> finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

422 U.S. at 78 (citations omitted, emphasis in original).

In its more recent pronouncements in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 100 S.Ct. 245, 249 (1979) (*"TAMA"*) and *Touche Ross & Co.* v. *Redington*, —— U.S. ——, ——, ——, 99 S.Ct. 2479, 2485, 2489 (1979), however, the Supreme Court has made clear that the dispositive inquiry in evaluating claims upon implied rights of action is the divining of whether *Congress intended* such a cause of action to be born,[11] the second of the

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[11] This conclusive reliance upon congressional intent in the evaluation of claims of implied rights of action is not simply an expedient tool or canon of construction, but is rooted in the limitations of the functional role allotted the judiciary by the Constitution. *United States* v. *Capeletti Bros.*, 621 F.2d at 1312; *Rogers* v. *Frito-Lay*, 611 F.2d at 1078. *See also Cannon* v. *University of Chicago*, —— U.S. ——, ——, 99 S.Ct. 1946, 1981-85 (1979) (Powell, J., dissenting). Although we may breathe practical life into them, the federal judiciary—endowed with no legislative or policy making authority—has no power to "imply" or otherwise to create private causes of action supplementary to express statutory schemes. Rather, we may only recognize or infer rights of action affirmatively created by the Legislative Branch, whether that affirmative legislative intent is manifested expressly in statutory language or by implication in statutory structure, context, or legislative history. That this approach may justifiably be characterized as a retrenchment from that applied in the recent past, when causes of action might have been judicially "implied" merely upon a court's policy determination that such a cause would be useful or "necessary" to statutory goals, is a lamentable indictment of our past failure to recognize or confine ourselves to our constitutionally assigned role and our concomitant willingness to countenance Congress' abdication to the courts of its constitutionally assigned policy making responsibility. *See Cannon* v. *University of Chicago*, —— U.S. at ——, 99 S.Ct. at 1981-85 (Powell, J., dissenting). *See also, TAMA*, —— U.S. at ——, 100 S.Ct. at 249 (Powell, J., concurring and indicating that the approach deployed there was consistent with his *Cannon* dissent).

Cort criteria. Thus the *Cort* factors, rather than being utilized as some sort of self-contained litmus test, are useful only insofar as they help to elucidate that legislative intent.[12] Indeed, as the opinions in both *TAMA* and *Touche Ross* demonstrate, should the issue of intent be settled by, for example, the legislative history and the language or structure of the statute, the inquiry has reached its end and no purpose is served by the further ritualistic application of the remainder of the *Cort* litany.[13] *TAMA*, —— U.S. at

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[12] Since the primary indicators of legislative intent are the language and overall structure of a statute as well as its legislative history and the context of its enactment, the first and third of the *Cort* factors are useful guideposts to intent, although not as directly to the point as the inquiry directed by the second criterion. *Touche Ross*, —— U.S. at ——, 99 S.Ct. at 2489; *Rogers* v. *Frito-Lay*, 611 F.2d at 1078-79 n.4.

[13] Our path is smoothed somewhat in that respect here by appellant Rosenthal's decision not to dispute two of the four *Cort* criteria. Appellant first has conceded, as it must, that regulation of the commodity futures trade plainly is not an area traditionally relegated to state law. Therefore, this fourth factor, to the extent that it carries any weight, balances in favor of the plaintiffs and will not be discussed further. Appellant further conceded in its Reply Brief that the first *Cort* factor—that plaintiffs are members "of a class for whose *especial* benefit to the statute was enacted"—should similarly be resolved in plaintiffs' favor. We are less certain of the correctness or advisability of this concession, particularly in light of this court's rigorous analysis of this factor in *United States* v. *Capeletti Bros.*, 621 F.2d at 1313-14. Also, *compare TAMA*, —— U.S. at ——, 100 S.Ct. at 249 (observing that § 206 of the Investment Advisors Act, 15 U.S.C. § 806-6 (an antifraud statute strikingly similar to that in issue here), "concededly was intended to protect the victims of the fraudulent practices it prohibited") *with Cannon* v. *University of Chicago*, —— U.S. ——, —— n.13, 99 S.Ct. 1946, 1955 n.13 (1979) (intimating in dictum that rule 10b-5 under the Securities Exchange Act of 1934 merely "create[s] duties on the part of persons for the benefit of the public at large" rather than a right in specific persons). *See also Leist* v. *Simplot*, —— F.2d at ——, —— [slip op. at 4063-71, dissent at 4133-42] (majority and dissent differ with regard to "especial benefit" factor when CEA applied to futures "speculators"). In fact, concession of this factor might have seriously skewed our analysis of the case under the puzzling

——, 100 S.Ct. at 249; *Touche Ross,* —— U.S. at ——, 99 S.Ct. at 2489.

As indicated above and as unquestioningly recognized by every court to entertain the issue, the focus of our inquiry is properly directed to the 1974 revision of the CEA. While many of the individual concepts and provisions originated in prior enactments, including § 6b (the antifraud provision), the overall "regulatory scheme as it exists today is a product of the 1974 amendments" and the drastic shift in regulatory philosophy that they represent. *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.,* 487 F.Supp. 416, 420 & n.6 (S.D.N.Y. 1980). Thus it is the intent of that Congress and the legislative history of that enactment that will form the basis of our decision here.

This focus on what is basically revisionary legislation, as opposed to an altogether new and original enactment, requires some adjustment or at least some reevaluation of

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assertion by the Supreme Court in *Cannon* that where "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a cause of action, although an explicit purpose to deny such a cause of action would be controlling." —— U.S. at ——, 99 S.Ct. at 1956, *quoting Cort* v. *Ash,* 422 U.S. at 82 (dictum) (emphasis in original).

The Supreme Court has more recently observed in *TAMA,* however, that "the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. [citations omitted]. The dispositive question remains whether Congress intended to create any such remedy." —— U.S. at ——, 100 S.Ct. at 249. We can only assume that this statement serves to repudiate the curious allusion in the *Cannon* statement to a drastically more liberal approach to "intent" where the first *Cort* criterion is satisfied. At the least, insistence upon the strict standard would seem reasonable in situations where (as opposed to *Cannon*) any "rights" of the class, at least potentially, may be adequately secured by the statute's express remedies. Consequently, we shall assume, *arguendo,* the correctness of appellants' concession and analyze this factor no further as well, directing our attention only toward the second and third *Cort* criteria.

the conventional analytical approach, however. In particular and most importantly, the fact that a private cause of action had *previously* been inferred under the old statutory scheme in connection with certain express provisions (such as §6b), which were incorporated or carried forward into the present structure, raises questions concerning the type of congressional intent we are bound to search for and where the axe should fall in the absence of *any* definitive evidence of intent.

As indicated in footnote 11, *supra*, an implied private right of action ordinarily may be recognized only upon clear evidence that Congress affirmatively intended to provide such a remedy. *See Touche Ross*, —— U.S. at ——, 99 S.Ct. at 2485. Customarily, "those who contend a statute has endowed them with a cause of action must establish their proposition," and their failure to demonstrate Congress' intent to provide a cause of action compels the denial of such actions. *Rogers* v. *Frito-Lay*, 611 F.2d at 1085.

Plaintiffs, along with the CFTC as *amicus curiae*,[14] contend here, however, that because courts had uniformly recognized private rights of action under the CEA prior to 1974, it is the *rejection* of a private right that would constitute a change in the status quo. Moreover, they suggest, Congress was or must have been aware of this judicial

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[14] Through its appearance here and in other litigation, along with its official pronouncements on the subject, *see* 41 Fed. Reg. 3994 (1976), the CFTC has made clear its belief that an implied right of action is available to private litigants. Ordinarily the interpretation of a statute by the agency charged with its administration would be entitled to great deference. *See United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977). The Supreme Court made clear in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1977), however, that such deference was not to be accorded on the narrow issue, "reserved for judicial resolution," of whether an implied right of action should be recognized under the statute.

stance. Therefore, they argue, the onus here should be upon the defendants to prove a congressional intent to alter this status quo by *abrogating* this previously existing cause of action in the course of the 1974 revision. This argument has some appeal and has been accepted and deployed by several courts, all of whom eventually upheld the existence of an implied private right. *See, e.g., Leist,* —— F.2d at —— [slip op. at 4061]; *Curran* v. *Merrill Lynch,* 622 F.2d at 234; *Alken* v. *Lerner,* 485 F.Supp. 871, 877 (D.N.J. 1980).

While we agree that some account must be taken of the pre-1974 judicial decisions inferring a cause of action and any congressional awareness of those decisions, we do not believe plaintiffs' suggested mode of analysis is appropriate to this case. As is recognized by the courts employing this approach, *see, e.g., Leist,* —— F.2d at —— [slip op. at 4061-62, 4077-80], the thesis has its foundation in the traditional canon of construction that, absent express indications to the contrary, the reenactment of statutes in substantially the same form or their wholesale adoption into other statutory schemes are presumed to perpetuate and incorporate the judicial baggage that has accumulated in relation to those provisions. *See, e.g., Lorillard* v. *Pons,* 434 U.S. 575, 580-81 (1978); *Alabama Association of Insurance Agents* v. *Board of Governors,* 533 F.2d 224, 245 (5th Cir. 1976), *cert. denied,* 435 U.S. 904 (1978). We believe, contrary to Judge Friendly's assertions in *Leist,* —— F.2d at —— [slip op. at 4077-78], that the 1974 revision of the CEA simply does not fall within this paradigm.

The CFTCA was not a mere reenactment, but the "first complete overhaul" of the CEA. H.R. Rep. 975, *supra,* at 1. While it is true as noted earlier that many of the substantive measures, such as the antifraud provision, 7 U.S.C.

§ 6b, were left untouched or were carried forward virtually unchanged into the new regulatory structure, the immediate context of those provisions was drastically changed. Most significantly, as delineated in Part I.B., *supra*, the enforcement scheme—which an implied right presumably had been thought necessary to supplement—was dramatically altered and expanded. So significant a transfiguration of the extant statutory framework is, itself, a wholesale obliteration of the prior status quo and sufficient reason for declining to adopt plaintiffs' analytical approach, grounded as it is in the reenactment doctrine described above. *Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1221; *Smith* v. *Groover*, 468 F.Supp. 105, 112-113 (N.D. Ill. 1979) (rejecting the identical approach urged here by plaintiffs and CFTC as *amicus curiae*).[15] Our decision to continue to require proof of affirmative congressional intent to provide a private right of action is further grounded in a related reason, however, calling into play still another canon that guides inquiries into the existence of implied causes of action.

As outlined in Part I.B., *supra*, Congress greatly expanded the federal regulatory enforcement arsenal in the 1974 Act by expressly enacting several potent new judicial and administrative tools and strengthening many of those previously contained in the CEA. Most significantly, for the first time it expressly provided for remedial mechanisms—and administrative reparations procedure, 7 U.S.C. § 18, and the requirement that exchanges provide

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[15] *Cf. Georgia* v. *United States*, 411 U.S. 526, 532-33 (1973) (applying the reenactment doctrine to uphold perpetuation of Supreme Court interpretation of the provision reenacted, with some changes in context, where, unlike here, that prior interpretation had been the subject of "extensive deliberations" at least in hearings, and Congress had thereafter done nothing to alter or foreclose that interpretation).

the means for arbitration of small claims, 7 U.S.C. § 7a(11) —through which those injured by violations of the Act could seek compensation from the infractors.

"[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *TAMA*, —— U.S. at ——, 100 S.Ct. at 247. Thus Congress' express provision in 1974 of the numerous judicial and administrative means for enforcing compliance with the antifraud and other provisions of the CEA—and most particularly the remedial mechanisms of arbitration and reparations procedures — in effect creates a presumption against the implication of yet another unexpressed judicial means of enforcement and remedy.[16] This "presumption" against finding an implied right of action may be overcome, but only upon "clear contrary evidence of legislative intent" affirmatively to provide such an implied right in addition to the express remedies. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("*Amtrak*"). *Accord, e.g., TAMA*, —— U.S. at ——, 100 S.Ct. at 247; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975). Therefore, following the pattern of *TAMA*, we conclude that the onus remains upon plaintiffs to demonstrate "a clear and affirmative congressional intent to approve a private right of

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[16] Indeed, the presumption is much more appropriately suited to this case than to the *TAMA* decision from which the formulation of the rule quoted in text was drawn. *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, 487 F.Supp. at 420. There the Supreme Court declined to infer a private cause of action for damages largely on the basis of express enforcement provisions merely aimed at sanctioning violators of the substantive provisions. As the court in *Navigator Group Funds* observed, the express provisions of the CFTCA include *compensatory* remedial mechanisms which are more truly functional alternatives to the implied judicial forum sought by injured customers. 487 F.Supp. at 420.

action.[17] *Leist*, —— F.2d at —— [slip op. dissent at 4147] (Mansfield, J., dissenting). *Accord, Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1218, 1220.

The history of judicial recognition of a private cause of action under the CEA prior to 1974 justified some adjustment to and tailoring of the traditional formulation of the precise nature of congressional intent that must be shown. Rather than requiring establishment of a legislative intent to *create* a cause of action, we will require proponents of the implied right here to show, first, simply that Congress was actually aware in 1974 of this prior judicial recognition of an implied right of action, and second, that it approved these holdings and affirmatively intended to adopt or incorporate this extant, judicially articulated, right of action into the comprehensive express legislative enforcement scheme erected by the 1974 Act.[18] It is to this precise inquiry, in addition to the arguments and evidence put forth by plaintiffs, along with our sister courts' attempt to satisfy this inquiry, that we now turn our attention.

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[17] We adopt this approach and embark on our analysis fully cognizant that application of plaintiffs' suggested approach, as in *Leist* and *Alken*, very well might—indeed, probably *would*—produce a different final result.

[18] Given such proof, the actual correctness or incorrectness of these earlier judicial decisions would be largely immaterial. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *General Services Administration*, 425 U.S. 820, 829 (1976). Thus, if Congress embraced such a cause of action and intended its perpetuation in the revised regulatory system, this affirmative intent renders completely irrelevant to our purposes the question of the propriety, under whatever standards, of the decisions originally giving birth to the cause of action. *Accord, Cannon* v. *University of Chicago*, —— U.S. at ——, 99 S.Ct. at 1964.

III. Congressional Intent

A. *Content of Act and Legislative History*

The direct sources from which plaintiffs might demonstrate the requisite congressional intent to provide, or to continue to provide, a private right of action are the legislative history, language and structure of the 1974 Act. Our study of these sources, however, guided by the plaintiffs' arguments, fails to yield any such "clear . . . evidence of legislative intent" to adopt such a private right.

Plaintiffs rely first on several passages of legislative history which, they argue, plainly demonstrate that Congress was aware in 1974, during its deliberations on the CFTCA, of the consistent judicial recognition of implied private rights under the CEA prior to that time. They point initially to two statements in H.R. Rep. No. 975, *supra*, at 46, 48, referring to the growth of private suits against contract markets for their failure to enforce their own rules as well as for actions taken in emergency situations. Representative Poage, the sponsor of H.R. 11955 (the version of the legislation that later passed the House as H.R. 13113, 93d Cong., 2d Sess. (1974)), also made essentially the same observation on the House floor. 119 Cong. Rec. 41333 (1974). Plaintiffs also point to several mentions of the existence of a private right of action by witnesses before the House and Senate Committees conducting hearings on the commodity futures legislation. Hearings before the Senate Committee on Agriculture and Forestry on S.2485, S.2578, S.2837, and H.R. 13113, 93d Cong., 2d Sess. 415 (1974) (hereinafter "Senate Hearings") (statement of Alvin Donahoo, Minneapolis Grain Exchange, noting court litigation as extant alternative to proposed arbitration procedures); Hearings Before the Comm. on Agriculture on H.R. 11955, 93d Cong., 2d Sess. 249, 321 (1974) (hereinafter

"House Hearings") (statements of representatives of international commodity exchanges and the Continental Grain Company, respectively, observing that in addition to the proposed reparations and exchange arbitration procedures "complainants of course have access to the courts." p. 249, and that "courts . . . have already held they have jurisdiction over private complaints," p. 321). *See also* Senate Hearings, *supra*, at 737, 746 (statement of Professor Ray Schotland, arguing for an express private right of action and assurance "that Federal and State courts are *still* open" (emphasis added)).

Stated charitably, we are less certain than are the plaintiffs and several of our sister courts[19] that these few fleeting references—sometimes cryptic and all comparatively isolated among the hundreds of pages of testimony and debate that comprise the legislative history of the 1974 Act —are sufficient to establish that the *entire* Congress was even aware of and duly considered the existence of any previously inferred cause of action in its deliberations and vote upon the CFTCA. *See SEC* v. *Sloan*, —— U.S. ——, ——, 98 S.Ct. 1702, 1712-14 (1978);[20] *Tennessee Valley Authority* v. *Hill*, —— U.S. ——, ——, 98 S.Ct. 2279, 2300-01 (1978). Plainly, the consideration of the prior judicial

[19] *E.g.*, *Leist* v. *Simplot*, —— F.2d —— at —— [slip op. at 4074-78]; *Curran* v. *Merrill Lynch*, 622 F.2d at 234; *Alken* v. *Lerner*, 485 F.Supp. at 877; *Smith* v. *Groover*, 468 F.Supp. at 113.

[20] In *Sloan*, the Supreme Court rejected the SEC's contention that its longstanding interpretation of a particular section of the Securities Exchange Act of 1934 had been essentially incorporated into that section by Congress' reenactment of the provision in substantially the same form. In doing so, even though the Senate committee overseeing the reenactment had not only acknowledged but expressly approved of the SEC's construction in its official report, the Court declined "to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." —— U.S. at ——, 98 S.Ct. at 1713.

interpretations here involved much less attention, even among the legislators and witnesses noted above, than the "extensive [legislative] deliberations" (albeit in hearings) of the Supreme Court's prior interpretation of a provision of the Voting Rights Act from which, in *Georgia* v. *United States*, 411 U.S. 525, 532-33 (1973), the Court presumed general congressional awareness and acceptance of that interpretation in the reenactment of the provision. *See* note 15, *supra*.

Nonetheless, even assuming that these remarks demonstrate Congress' awareness of the prior judicial recognition of an implied right under the CEA[21] and that the first prong of our inquiry (delineated in Part II, *supra*) is satisfied, these passages unquestionably give no indication that Congress *approved of* and intended to perpetuate such actions as a part of the elaborate express enforcement scheme that it was in the process of fashioning.[22] Proof of such approval is, of course, the vital element of congressional intent which plaintiff must establish.[23]

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[21] In the context of a similar situation, the Supreme Court stated in *Cannon* that "[i]t is always appropriate to assume our elected officials, like other citizens, know the law"—referring to the prior judicial construction of a statute upon which the one under the Court's consideration had been patterned. —— U.S. at ——, 99 S.Ct. at 1957-58 (dictum). This suggests that awareness of the prior judicial constructions recognizing an implied right of action under the CEA apparently may merely be *ascribed* to Congress. However, the wisdom of *imputing* to Congress the knowledge upon which we then, in turn, *assume* that legislation is predicated, seems dubious. *See SEC* v. *Sloan*, —— U.S. at ——, 98 S.Ct. at 1712-14, and note 20, *supra*.

[22] The polarity between the analytical approaches and concepts of burden of persuasion employed by this court and the Second Circuit in *Leist* is epitomized by Judge Friendly's observation, respecting the passages of legislative history just examined, that "[i]t matters little whether this be called recognition or approval [of prior implied rights]." —— F.2d at —— [slip op. at 4075-76].

[23] Indeed, the passages in the H.R. Rep. 975 as well as Representative Poage's remarks evince a disparagement of such actions,

For their demonstration of congressional approval and adoption of the judicially created right of action, then, plaintiffs rely almost totally on the jurisdictional savings proviso of 7 U.S.C. § 2. Set amid the ascription of exclusive jurisdiction over futures trading to the CFTC, this proviso states that "[n]othing in this section[24] shall supersede or limit the jurisdiction conferred on courts of the United States . . . ." This, plaintiffs contend, affirmatively demonstrates the intent of Congress to retain the power of the courts to entertain private actions under the CEA. *See* A. Bromberg & R. Lowenfels, Securities Fraud & Commodities Fraud § 461 at 82.362-.363 (1979).

The language of the proviso does not clearly evince an intent to approve of implied private actions, however,[25] and the legislative history relevant to this specific proviso indicates that it probably was intended to serve another purpose entirely. The House, Senate and Conference reports all are mute as to the purpose behind the proviso, which was added to H.R. 13113 in the Senate. Allusions to the pro-

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at least insofar as they had presented an impediment to effective exchange self-regulation—quite likely a factor in the exclusion of exchanges from the ranks of those suable by states under 7 U.S.C. § 13a-2 and those susceptible to the administrative reparations procedure of 7 U.S.C. § 18.

[24] Even though the proviso explicitly provides only that nothing "in this *section*" was meant to supersede extant court jurisdiction, the legislative history illustrates that Congress' intention was that nothing in the *Act* was to be taken to diminish that jurisdiction. S. Rep. No. 1131, 93d Cong., 2d Sess. 23, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5863; 120 Cong. Rec. 34737, 34997 (1974).

[25] If we may indulge in so simplistic an observation: it is quite a different matter to remove the jurisdiction of courts over even a limited subject area like futures trading, than to eliminate a cause of action within that subject area. By the same token, a provision such as that in § 2, which explicitly directs the retention of jurisdiction, need not also denote the retention of an individual cause of action.

vision during debates on the floor are similarly unenlightening.

Only recourse to the attenuated source of hearing testimony gives any hope of insight. Plaintiffs argue, therefore, that the proviso was enacted in response to the admonitions of Senator Dick Clark and Professor Roy Schotland that some sort of express assurance should be given complainants that the courts were still open to them under the new Act. Senate Hearings, *supra*, at 205, 737 & 746.[26]

Rosenthal contends, on the other hand, that the more likely stimulus for the proviso was the statement of the Chairman of the House Judiciary Committee, Representative Peter Rodino, Senate Hearings, *supra*, at 257-60, and the testimony of Deputy Assistant Attorney General Keith Clearwaters directly attacking the exclusive jurisdiction provision of § 2 to which the proviso was eventually added, *id.* at 663-64. The concern of both these witnesses was that the all-encompassing language of § 2, allocating to the CFTC exclusive jurisdiction over the futures trade, was so broad that it even "could be interpreted to deprive Federal courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce

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[26] Senator Clark testified that,

> "Often the most effective enforcement tool is a private suit where the plaintiff can recover three times his actual damages. The McGovern bill also authorizes them. Unfortunately, the House bill not only does not authorize them, but section 201 of the bill [now 7 U.S.C. § 2] may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate."

Senate Hearings, *supra*, at 205.

Professor Schotland, while addressing the proposed reparations procedure, observed more generally that "[i]f you do choose to retain [the reparations mechanism] . . . there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there." *Id.* at 737, 746.

contract and commercial law rights" in the futures area. *Id.* at 663. Because these statements, as opposed to those relied upon by plaintiff, are derived from extensive and pointed attacks on the very section that the proviso later served to amend and because they, like the proviso itself, are directed to the question of jurisdiction as opposed to a single cause of action, *see* note 25, *supra*, the Rodino-Clearwaters' statements do appear to be the somewhat more likely source for the proviso.

Unfortunately, we may only speculate since, as stated above, Congress gave us no indication of which, if either, of these sets of comments spurred it to add the proviso of § 2. We are likewise unable to deduce the answer with any certainty solely on the basis of the nature of the comments. Even this statement and the sheer speculativeness of the true answer, however, effectively blunt plaintiffs' reliance on the § 2 proviso as a "clear and affirmative" indication of congressional intent to approve or adopt an implied cause of action.

Plaintiffs find little support elsewhere in the legislative history of the 1974 Act.[27] On the other hand, appellant

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[27] Some additional purported inferences of congressional awareness and approval of an implied cause of action have been noted by other courts. We find none of them persuasive. For example, both the *Leist* and *Curran* majorities presume, from various statements throughout the legislative history to the effect that the purpose of the CFTCA was "to strengthen" regulation, *e.g.*, H.R. Rep. 975, *supra*, at 53-54, that any existing enforcement mechanisms were meant to be maintained. *Leist*, —— F.2d at —— [slip op. at 4080-81], *Curran* v. *Merrill Lynch*, 622 F.2d at 232. It is just as reasonable to infer, however, that this "strengthening" of the extant regulatory structure was to be accomplished by the centralization in the federal government of a much-enlarged express enforcement structure, and that the "strengthening" need not include private actions—especially in light of the reparations procedure.

A second example is the reliance in *Leist*, —— F.2d at —— [slip op. at 4084-85], for instance, on the observation of Senator

Rosenthal seeks to solidify its case further by arguing that at least one aspect of that legislative history indicates an intent to deny the existence of a private cause of action.

In the process of enacting the CFTCA, Congress considered, but failed to adopt, no fewer than three bills containing express private rights of action. H.R. 11195, 93d Cong., 1st Sess. § 17(3) (1973); S. 2837, 93d Cong., 1st Sess. § 505 (1973); S. 2578, 93d Cong., 1st Sess. § 203(3) (1973). The weight to be given to a failure to enact such a provision—not an outright rejection by vote of either house—is unclear. *Compare Amtrak*, 414 U.S. at 460-61 ("Committee's deliberate failure to adopt that proposal . . . cannot but give weight" to the committee's disapproval of the principle contained in the proposal) *with Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 n.11 (1969) ("unsuccessful attempts at legislation are not the best guides to legislative intent"). Whatever clear inference might ordinarily be drawn from such an occurrence is largely undercut here by the fact that each of the bills provided for treble damages, at least for willful violations of the Act. Congress' refusal to adopt these bills might just as reasonably be presumed to have derived from an opposition to treble damages as

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Talmadge that "[i]t is hoped that 'giving the Commission this [reparations] authority will somewhat' lighten the burden upon the courts . . . ." 120 Cong. Rec. 30459 (1974). The argument raised from this is that if the reparations procedure had been intended fully to displace rather than supplement implied judicial actions, the Senator would have *known* rather than "hoped" that the burden on the courts would be significantly lightened. Aside from the fact that the Senator's statement concludes by noting, however, that the entire appeal and enforcement process remains in the courts, this particular statement was made with respect to a bill in which the right of appeal from a reparations proceeding lay initially to *district court*. H.R. 13113, *supra*, § 106. Thus while one might hope for a reduction in judicial time commitments, there was little reason to expect a decreased docket of cases.

from an opposition to the damage remedy itself. *Alken* v. *Lerner*, 485 F.Supp. at 877. Consequently, this indicator of Congress' purported intent to deny private rights of action is hardly less equivocal than those relied upon by plaintiffs to show the opposite intent.[28]

Having failed to distill any tangible evidence of affirmative congressional intent from the legislative history, language or structure of the 1974 Act, plaintiffs next argue that a congressional purpose to provide a cause of action may be inferred simply from the context or *zeitgeist* in which the legislation was enacted. They rely for this assertion on the discussion in *Cannon* v. *University of Chicago*, —— U.S. ——, ——, 99 S.Ct. 1946, 1958 (1979), to the effect that statutes, such as the CFTCA, enacted during a period when the courts were much more liberal in their approach to implied rights of action, *see, e.g., J. I. Case* v. *Borak*, 377 U.S. 426, 433 (1964), must be judged in light of that "con-

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[28] Each party seeks to embellish the basic analysis above, to some extent. Plaintiffs contend, supported by some district courts, that Congress' failure to enact these express provisions actually provides evidence that Congress recognized and approved the existing implied right and saw no need to supplement or expand it. *See Navigator Group Funds*, 487 F.Supp. at 423, *quoting*, *Smith* v. *Groover*, 468 F.Supp. 113; *Alken* v. *Lerner*, 485 F.Supp. at 877. This is a very attenuated inference, however, and we join in the statement of the Supreme Court in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 478 (1959): "we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed."

Rosenthal, on the other hand points out that the reparations procedure that was eventually enacted first made its appearance in H.R. 11955, immediately after the failure and withdrawal of the express judicial cause of action in H.R. 11195. *See Fischer* v. *Rosenthal & Co.*, 481 F.Supp. at 56. While this very well could be mere coincidence, one might infer from the chain of events that the reparations procedure was indeed viewed by Congress as displacing any judicial forum. The legislative history contains no express discussion elucidating any relationship between the two.

temporary legal context." [29] From this, they contend that it must be presumed, in the absence of contrary evidence, that Congress expected the judiciary to supply any cause of action consistent with the prevalent pattern of interpretation of that time. *Accord, Navigator Group Funds* v. *Shearson Hayden Stone,* 487 F.Supp. at 421 (applying the *Cannon* thesis to CFTCA); *Alken* v. *Lerner,* 485 F.Supp. at 876-77 (same).

We agree that the liberal judicial climate in which the CFTCA was born requires us to be more solicitous and sensitive to indications of Congress' desire to create a cause of action. Indeed, any indication that Congress actually intended merely to leave the question to the judiciary to be resolved according to its contemporary rules of construction, while clearly inadequate under current standards, would likely be sufficient to carry the day here.

The prior judicial activism and our present duty of solicitousness because of that, however, cannot alter the constitutional requirement, *see* note 11, *supra,* that a cause of action be created only by Congress. There must be some expression of affirmative congressional intent either to provide a cause of action or at least to rely on the context of judicial activism contemporary to the enactment (though the latter is somewhat unrealistic). In *Cannon,* for example, the Court observed that Congress "*explicitly* assumed that [the statute in question] would be interpreted and applied as" had the statute upon which it was patterned, including the judicial recognition or creation of an implied cause of

[29] The *Amtrak* case was handed down during congressional deliberations on the CFTCA. However, the restrictive trend toward implied rights of action initiated there and carried forward with increasing intensity through later cases such as *Barbour, Cort,* and others up to *TAMA* and *Touche Ross,* could not have been evident to or anticipated by Congress at the time it enacted the CFTCA.

action thereunder. —— U.S. at ——, 99 S.Ct. at 1956-57 (emphasis added). We have received no such message from the enactors of the CFTCA.

Finally, plaintiffs contend that the legislative history of the 1978 amendments—specifically certain remarks of Senator Huddleston and Leahy during debate on the Senate floor—demonstrate Congress' assumption and understanding that implied private actions are available under the Act. Initially, we note that the views of subsequent Congresses (and particularly the isolated remarks of individual legislators) hardly provide the most persuasive evidence of the intent of the enacting Congress. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, —— U.S. ——, ——, 100 S.Ct. 2051, 2060-61 (1980); *Rogers* v. *Frito-Lay*, 611 F.2d at 1080-81. However, virtually every court to consider the issue before us since 1978 has taken into account, with varying degrees of deference, the legislative history of the 1978 amendments. Moreover, we are reminded by other Supreme Court opinions that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight, . . . and particularly so when the intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, —— U.S. ——, ——, 100 S.Ct. 800, 814 (1980) (citations omitted). *Accord, Cannon* v. *University of Chicago*, —— U.S. at —— n.7, 99 S.Ct. at 1952 n.7 (subsequent legislative history not as pertinent as contemporary history, but helpful to some extent). Therefore, we shall attempt to glean what we can from this field of legislative material.

The remarks in question of Senators Huddleston and Leahy, reproduced in the margin,[30] do indicate a clear as-

[30] While introducing the amendment raising from $2,500 to $5,000 the amount necessary to secure a full-fledged hearing in the reparations procedure, 7 U.S.C. § 18(b), Senator Huddleston

sumption on the part of these two legislators that an implied private right of action was available under the CEA even after the 1974 revision. There is no indication elsewhere, however, that this assumption was shared by the remainder of Congress. In fact, certain other aspects of the 1978 legislative history imply the *absence* of such an assumption on the part of Congress as a whole.

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discussed the backlog problem that the amendment was designed to help alleviate:

> "Compounding the undue stress placed on the reparation program, certain Federal district courts have taken the unfortunate position that Congress intended reparations to be the exclusive forum for adjudicating commodity customer claims. [citations omitted.] In order to alleviate the burden on the Commission's reparation program, the committee adopted an amendment that provides—for reparation complaints where the amount claimed as damages does not exceed $5,000—that a hearing be held only on the novel or basic issues that are determinative of the case. Thus, an aggrieved commodity customer will be able to obtain more expeditious treatment of his claim should the customer elect to pursue a claim in reparations rather than to proceed to arbitration or pursue in court the private right of action which has been judicially implied for violations of certain provisions of the Commodity Exchange Act, or which in the future courts may recognize for other provisions of the act."

124 Cong. Rec. 10537 (1978).

Senator Leahy, in discussing the new provision expressly allowing states to pursue *parens patriae* actions for damages on behalf of their residents, observed:

> "The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission regulation, institution of Commission enforcement proceedings, and the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the Commodity Exchange Act. In those actions brought by a State under this bill, a customer who makes an informed, voluntary election to have his State sue on his behalf to recover monetary damages for a particular violation would thereby extinguish that person's other alternatives for redress: arbitration reparations, or judicially implied private rights of civil action under the Act."

124 Cong. Rec. S.16527 (daily ed. Sept. 28, 1978).

For example, the Senate report on the bill, S. Rep. No. 850, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 2087, twice catalogs the means by which "customers are afforded protection" under the CEA, and each time conspicuously omits to mention an implied private right of action. *Id.* at 12-13, 32 (the latter passage states, in reference to a provision not included in the bill as enacted, that "[a]ggrieved customers . . . would have the choice of seeking resolution of their claims through association arbitration or reparations proceedings or a Commission reparations proceeding"). *See also* H.R. Rep. No. 975, *supra*, at 22 (similarly noting that the reparations procedure was "designed to supplement the informal 'settlement procedures' contemplated of the contract markets . . . which are required under other sections of the legislation," omitting any reference to such a procedure being supplementary to any judicial forum).

A second indicator that the assumption expressed by Senators Huddleston and Leahy was not one shared by the remainder of Congress is found in the 1978 amendment expressly providing a cause of action to the states, 7 U.S.C. § 13a-2.[31] Section 13a-2(2) provides exclusive jurisdiction to the federal courts for suits based on violations of the CEA and brought by states under this section. No such

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[31] It has been suggested that the passage of the express cause of action for states in § 13a-2 demonstrates that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly," *Touche Ross*, —— U.S. at ——, 99 S.Ct. at 2487, and it obviously, therefore, did *not* intend to provide a cause of action for individuals under the CEA. *See, e.g., Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1220-21. While we are not insensitive to the logic of this position, the legislative history of § 13a-2 indicates that a primary motivator in making explicit the right of states to sue may have been the need to overcome various common law prerequisites and restrictions on such *parens patriae* suits. *See* S. Rep. No. 850, *supra*, at 25. *Accord, Leist* v. *Simplot*, —— F.2d at —— [slip op. at 4098-99].

provision exists with respect to the Act generally. The rationale behind this reservation of exclusive jurisdiction is two-fold: (1) to draw upon the extensive experience developed exclusively in federal courts in similar cases under the Securities Exchange Act of 1934 under which they similarly hold exclusive jurisdiction, 15 U.S.C. § 78aa, and (2) by means of recourse to this experience, to evolve a unified "coherent body of [decisional] law" under the CEA. S. Rep. No. 850, *supra*, at 25. In view of these goals, it would be anomalous indeed for Congress to require exclusive jurisdiction only of these relatively infrequent suits by states while continuing to countenance an implied cause of action, without such a restriction, for any individual who cares to sue. The natural inference is, therefore, that no such individual suits were contemplated.

B. *Consistency With Statutory Goals*

Our final inquiry is that directed by the third *Cort* criterion. Like our excursion into more direct indicators of legislative intent, this foray also yields only conflicting or equivocal results. It is, of course, true that the recognition of an implied private right of action for damages would provide another, perhaps useful, enforcement tool in harmony with the aim of the CEA to protect futures customers from fraud and market manipulation. *Curran* v. *Merrill Lynch*, 692 F.2d at 234-35.[32]

As noted earlier, however, a second goal of the 1974 legislation was to create a "uniform regulatory structure" evolving a coherent body of law coordinated by the CFTC. S. Rep. No. 850, *supra*, at 10, 25; H.R. Rep. No. 975, *supra*, at 1. In order to effectuate this purpose, "[t]o assure that the

[32] In light of the reparations procedure it is *not* true, however, that such private actions are "necessary" to effectuate the purposes of the statute, as has sometimes been required. *See United States* v. *Capelleti*, 621 F.2d at 1317.

body of decisional laws developed under [the CEA] would be coherent and consistent with national policy," the Senate version of the 1978 amendments initially required states to receive approval from the CFTC before they could bring an action under § 13a-2. S. Rep. No. 850, *supra*, at 26. Although this provision was not incorporated into the bill as finally enacted, the same function was to be served by the provision in the Act as passed, § 13a-2(3), requiring states to notify the Commission of their intent to file suit and guaranteeing the Commission's right to intervene in any such suit.

From these restrictions and the remarks in the Senate report, it is apparent that Congress perceived even infrequent uncontrolled suits for damages even by the state governments as a threat to the goal of developing a coherent and consistent body of law. Yet, as was the case with respect to the similar concern over the exclusivity of federal jurisdiction, above, no such restraints or safeguards would be placed by the statute as presently constituted on the potentially much more numerous and diverse suits that would be lodged pursuant to an implied private cause of action. In this situation we are counselled by the Supreme Court's admonition in *Santa Clara Pueblo* v. *Martinez*, —— U.S. ——, ——, 98 S.Ct. 1670, 1680 (1978): "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other."

IV. Conclusion

The foregoing analysis of the language, structure and legislative history of the 1974 version of the CEA and its 1978 amendments obviously has yielded a result that might be described as emphatically equivocal. Although some in-

dividual passages or aspects of the Act appear to give some insight, these inferences frequently conflict with those from other passages or, upon closer examination, their apparent persuasiveness dims or vanishes. Chief Justice Marshall once observed that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . . ." *United States* v. *Fisher*, 2 Cranch. 358, 386 (1805), *quoted in, Brown* v. *General Services Administration*, 425 U.S. 820, 825 (1976). After our analysis of the legislative material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design—a singularly inappropriate base upon which to predicate an implied private cause of action.

The net result of our study and deliberations in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case, as explained in Part II, *supra*—given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action—we are bound to refuse plaintiffs' suit.

Accordingly, the order of the district court denying appellants' motion to dismiss plaintiffs' claims under the CEA is REVERSED and the case REMANDED.

Office-Supreme Court, U.S.
FILED
APR 9 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-757, 80-895, 80-936

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,

Respondents.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,

Petitioner,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,

Respondents.

HEINOLD COMMODITIES, INC. and THOMSON & McKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,

Respondents.

HEINOLD COMMODITIES, INC. and THOMSON & McKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

(List of counsel on inside cover)

PETITIONS FOR CERTIORARI FILED NOVEMBER 11, DECEMBER 4 AND DECEMBER 5, 1980

CERTIORARI GRANTED FEBRUARY 23, 1981

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List of Relevant Docket Entries

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

Leist, et al. v. *Simplot, et al.*, 76 Civ. 4350 (LFM)

Sept. 30, 1976	Complaint filed and summons issued.
Nov. 16, 1976*	Answer of defendant Heinold Commodities, Inc. ("Heinold") filed.
Dec. 1, 1976	Answer of defendant Thomson & McKinnon Auchincloss Kohlmeyer Inc. ("Thomson")†
Dec. 2, 1976	Answer of defendants New York Mercantile Exchange, Richard B. Levine ("Levine"), Howard Gabler ("Gabler") and Alfred Pennisi ("Pennisi")†
Dec. 3, 1976	Answer of defendant Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") filed.

* During the period from November 1, 1976 to April 14, 1977, the answers to the following defendants, who are not parties to the pending appeal, were served: John Richard Simplot; J. R. Simplot & Co.; Simplot Industries, Inc.; Simtag Farms, Inc.; Peter J. Taggares; P. J. Taggares & Co.; Henry A. Pollak; Harvey B. Pollak; Harvey B. Pollak Company; Pressner Trading Corp.; Benjamin Pressner; Stephen Sundheimer; Jules Nordlicht; Edelstein & Co., Inc.; Charles Edelstein; Robert Edelstein; Muriel Edelstein; S. Meierfeld, Inc.; Gilbert Meierfeld; David Meierfeld; Robert Reardon; F. J. Reardon, Inc.; Alex Sinclair; Manning Stoller; Hornblower, Weeks-Hemphill, Noyes; MFX Commodities, Inc.; Donald Silver; Duane South; Kenneth Ramm; A&B Farming, Inc.; Gearheart Farms, Inc.; Edward McKay; and Frank Fullmer.

† The items designated by this symbol were filed on August 8, 1979 as part of the Supplemental Record on Appeal. The dates shown above are those appearing on the documents themselves.

Sept. 29, 1978	Defendants New York Mercantile Exchange, Levine, Gabler, and Pennisi move for judgment on the pleadings or for summary judgment.
Oct. 24, 1978	Defendant Clayton moves for judgment on the pleadings or for summary judgment.†
Dec. 4, 1978	Defendant Heinold moves for summary judgment.
Dec. 4, 1978	Plaintiffs' papers in opposition to motion of defendants New York Mercantile Exchange, Levine, Gabler and Pennisi filed.
Dec. 4, 1978	Defendant Thomson's affidavit in support of motions of defendants Clayton and Heinold†
Dec. 7, 1978	Plaintiffs' papers in opposition to motion for defendant Clayton filed.
Dec. 26, 1978	Plaintiffs' papers in opposition to motions of defendants Heinold and Thomson filed.
Jan. 16, 1979	Objections of defendants New York Mercantile Exchange, Levine, Gabler, Pennisi, and Heinold to plaintiffs' input for pre-trial order filed.
Feb. 2, 1979	Objections of defendant Clayton to plaintiffs' input for pre-trial order filed.
May 7, 1979	Objections of defendants Clayton and Heinold to plaintiffs' additional and revised input for pre-trial order filed.

May 30, 1979	Opinion and Order of the District Court for the Southern District of New York filed.
July 5, 1979	Judgment of the District Court entered.
July 20, 1979	Plaintiffs' amended notice of appeal to the Court of Appeals for the Second Circuit filed.
Apr. 3, 1981	Plaintiffs' input for pre-trial order and plaintiffs' additional and revised input for pre-trial order filed.

Incomco v. *New York Mercantile Exchange, et al.*,
76 Civ. 2648 (LFM)

June 16, 1976	Complaint filed and summons issued.
Nov. 3, 1976	Answer and cross-claims of defendant New York Mercantile Exchange filed.
Sept. 29, 1978	Defendant New York Mercantile Exchange moves for judgment of the pleadings or for summary judgment.
Dec. 4, 1978	Plaintiff's papers in opposition to motion of defendant New York Mercantile Exchange filed.
May 30, 1979	Opinion and Order of the District Court for the Southern District of New York filed.
July 5, 1979	Judgment of the District Court entered.
July 20, 1979	Plaintiff's amended notice of appeal to the Court of Appeals for the Second Circuit filed.

National Super Spuds, Inc., et al. v. *New York Mercantile Exchange, et al.*, 76 Civ. 2375 (LFM), 76 Civ. 2554 (LFM), 76 Civ. 2571 (LFM), 76 Civ. 2594 (LFM)

May 26, 1976	Complaint filed and summons issued.
Oct. 4, 1976	First amended consolidated class action complaint filed.
Nov. 3, 1976	Answer of defendant Clayton filed.
Nov. 4, 1976	Answer of defendant Heinold filed.
Nov. 9, 1976	Answer of defendant Thomson filed.
Oct. 25, 1978	Defendant Clayton moves for judgment on the pleadings or for summary judgment.
Dec. 1, 1978	Plaintiffs' papers in opposition to motion of defendant Clayton filed.
Dec. 4, 1978	Defendant Heinold moves for summary judgment
Dec. 12, 1978	Defendant Thomson's affidavit in support of motions of defendants Clayton and Heinold filed.
Jan. 29, 1979	Plaintiffs' papers in opposition to motion of defendant Heinold filed.
May 30, 1979	Opinion and Order of the District Court for the Southern District of New York filed.
July 6, 1979	Judgment of the District Court entered.
Aug. 20, 1979	Plaintiffs' amended notice of appeal to the Court of Appeals for the Second Circuit filed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT:

Leist, et al. v. *Simplot, et al.*, 79-7402, 79-7464, 79-7482

July 27, 1979	Appellants New York Mercantile Exchange, Levine, Gabler and Pennisi move for leave to consolidate the appeals from the three actions identified above.
Aug. 30, 1979	Order granting leave to consolidate endorsed.
Jan. 16, 1980	Case argued before Friendly, Mansfield and Kearse, C.JJ.
July 8, 1980	Opinion and Dissent of the Court of Appeals for the Second Circuit filed and judgment entered.
July 22, 1980	Petition for Rehearing with a suggestion for rehearing in banc of appellees New York Mercantile Exchange, Levine, Gabler and Pennisi filed.
July 22, 1980	Petition for Rehearing with a suggestion for rehearing en banc of appellee Heinold filed.
July 22, 1980	Petition for Rehearing with a suggestion for rehearing en banc of appellee Clayton filed.
Sept. 9, 1980	Orders of the Court of Appeals denying Petition for Rehearing with a suggestion for rehearing in banc of appellees New York Mercantile Exchange, Levine, Gabler and Pennisi entered.
Sept. 9, 1980	Orders of the Court of Appeals denying Petition for Rehearing with a suggestion for rehearing en banc of appellee Heinold entered.

Sept. 9, 1980	Orders of the Court of Appeals denying Petition for Rehearing with a suggestion for rehearing en banc of appellee Clayton entered.

IN THE SUPREME COURT OF THE UNITED STATES:

Nov. 11, 1980	Petition for certiorari of New York Mercantile Exchange, Levine, Gabler and Pennisi filed (No. 80-757).
Dec. 4, 1980	Petition for certiorari of Clayton filed (No. 80-895).
Dec. 5, 1980	Petition for certiorari of Heinold and Thomson filed (No. 80-936).
Feb. 23, 1980	Petitions for certiorari in 80-757, 80-895 and 80-936 granted and cases consolidated.

Complaint in
Incomco v. New York Mercantile Exchange, et al.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INCOMCO, a partnership,

Plaintiff,

—against—

THE NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO., and HAROLD COLLINS,

Defendants.

COMPLAINT

Plaintiff, by its attorney, complaining of defendants alleges as follows:

THE PARTIES

1. The plaintiff Incomco is a partnership engaged in business as a licensed futures commission merchant earning its commissions in the trading of contracts for commodities and commodity futures for customers. It also trades contracts for commodities and commodity futures in its own account. It has its office and only place of business in the Southern District of New York.

2. The defendant The New York Mercantile Exchange ("NYME") is an exchange constituted and licensed pursuant to United States Law (Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*) as an approved contract market for the purposes of conducting and regulating trading in various approved contract markets one of which is potato futures.

3. In addition to the regulation of trading the NYME also promulgates rules on the methods of shipping and delivery (by railroad in the potato market) attendant thereto, and also promulgates measures to be taken by it in the event of a default in delivery.

4. The New York Mercantile Exchange is composed of an individual who is its President and other individuals designated as "Members", a number of whom are further designated as a "Board of Governors"; the actions of The New York Mercantile Exchange are formulated and implemented through either its President or its Board of Governors or a committee constituted by them.

5. The defendant Wayne County Produce Company ("Wayne") is engaged in the potato business as a grower, exporter, shipper and merchandiser thereof in various geographic localities, and upon information and belief dealt with potatoes which were or became subject to trading in the markets regulated by the NYME.

6. The defendant Harold Collins ("Collins") is an individual who is the principal of Wayne. Any and all of the acts complained of against Wayne were the results of Collins' conduct.

JURISDICTION

7. The NYME on the one hand and Wayne and Collins on the other, acting separately and also in concert with each other have violated the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, thereby raising a federal question.

8. The NYME on the one hand and Wayne and Collins on the other, acting separately and also in concert with each

other have violated the U.S. Anti-Trust Laws, 15 U.S.C. 13 *et seq.*, thereby raising a federal question.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

9. Plaintiff was trading certain potato contracts in and around February and March of 1976 which were due to expire on March 5, 1976; these potato contracts (the "March contracts") of which there were 30 in number, representing 30 railroad cars of potatoes of 50,000 pounds each, are hereafter referred to as "The 30 Lots" or "The 30 Cars".

10. The 30 March contracts herein had been purchased by plaintiff as futures and delivery was taken at a price of $7 per hundredweight. In the terminology used by traders and the parties hereto, plaintiff then became "long cash potatoes". Said potatoes on which delivery was taken were stored in the warehouse of plaintiff's agent, in Ft. Fairfield, Maine.

11. Subsequent thereto and in early May 1976, there were traders and merchants and brokers and speculators who were "short" May potato futures and were actively seeking to purchase potatoes. Again, the terminology of the trade regarding "shorts" are those who have sold contracts for potatoes that they did not then own against the expectation and necessity of buying back those contracts, hopefully at a lower price than at which they sold their short or by making actual delivery of the cash article to close out their short potato contracts.

12. Plaintiff with the expectation of realizing profits on its 30 lots by selling them those described in paragraph

"11" *supra,* instructed its agent to prepare for delivery of the 30 lots, which would have premium value because of a shortage of deliverable grade potatoes.

13. Plaintiff through its agent had in fact agreed to sell its potatoes to others who needed them to make delivery against their short positions.

14. In accordance with plaintiff's instructions its agent ordered railroad cars on May 3, 1976 from the Bangor and Aroostook Railroad ("B & A") to be placed at his warehouse in Maine for intended May delivery; the B & A is the only railroad servicing the potato deliveries which are the subject of this lawsuit.

15. The railroad cars were not forthcoming from B & A for the reason that they were already loaded with potatoes for overseas export by Wayne and Collins, who, along with others, had physically tied up the actual railroad cars by willfully failing to unload same or only partially unloading same for the express purpose of blocking the availability of railroad cars, thereby creating an artificial and manipulative railroad car shortage.

16. Upon information and belief these subject railroad cars full of potatoes for export were awaiting sea transportation at Sears-Port, Maine; however, at least one ship which appeared at Sears-Port for the purpose of loading the said export potatoes was sent away empty and, upon information and belief few, if any, of the alleged (export) orders were ever actually loaded aboard ship.

17. Pursuant to its rules and regulations, the NYME has the right to proclaim an emergency and extend the period

for delivery of the contracts that are approved on its markets, and it has the further right to proclaim an emergency and allow a delivery by truck rather than by railroad.

18. When plaintiff's agent learned that the railroad cars he had ordered from B & A were not forthcoming, he made immediate and repeated oral demands on the NYME, on May 10, 11, and 12, 1976, for an extension of time within which to deliver plaintiff's 30 cars and/or for permission to deliver the said potatoes by truck.

19. The NYME first orally indicated that it would grant the oral demands of plaintiff's agent, but never actually did so; accordingly plaintiff's agent immediately made similar demands in writing on May 12, 13, and 14, 1976, but these written demands were simply disregarded by the NYME.

20. In addition, to the foregoing, upon information and belief, defendant Collins was also trading potato contracts and was actually long potatoes during the relevant period. At the same time Collins and others further contracted to buy potatoes from plaintiff and from various growers and shippers in Maine which he thereafter refused to honor and has never honored to date.

21. Also, in addition to the foregoing, defendant Wayne and others had signed contracts for purchase of potatoes destined for alleged export orders but said export orders upon information and belief never existed and said contracts were dishonored. Again all in the furtherance of a deliberate plan and conspiracy to manipulate the potato market.

22. Upon information and belief, several of the members and governors of the NYME as well as their firms and customers, were also individually long potato futures.

23. Therefore, it was in the financial interest of all defendants to prevent other longs, such as plaintiff, from delivering their potatoes and in actually acting to prevent such delivery, both separately and/or in concert with one another.

24. By preventing delivery of potatoes by others defendants created a situation in which an improper default was created in the delivery of potatoes against the May contracts.

25. The conduct of the defendants, as aforesaid, constituted violations of the Commodity Exchange Act to the detriment of the plaintiff.

26. As a result of the foregoing, the plaintiff has been damaged by the defendants in an amount that cannot presently be calculated, but which is far in excess in the jurisdictional limitation of this Court.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

27. Plaintiff repeats all of the allegations of paragraphs "1"-"24" hereinabove as if fully set forth herein.

28. The conduct of defendants in manipulating and in conspiring to manipulate prices of the cash potato market constituted violations of the United States Anti-Trust Laws to the detriment of the plaintiff.

29. As a result of the foregoing, the plaintiff has been damaged by the defendants in an amount that cannot be presently calculated, but which is far in excess of the jurisdictional limits of this Court, and said amount of damages should be trebled in accordance with the law.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

30. Plaintiff repeats all of the allegations of paragraphs "27" and "28" hereof as if fully set forth herein.

31. As a result of the foregoing plaintiff should be awarded attorney's fees in accordance with the law and which may hereafter be set by the Court.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANT NYME

32. Plaintiff repeats all of the allegations of paragraphs "1"-"24" hereinabove as if fully set forth herein.

33. Pursuant to its rules and regulations, when there is a default in delivery, the President of the NYME or a broker appointed by him shall be required to buy in the cash market for the account of the delinquent sellers so that the outstanding obligations shall be fulfilled.

34. However, in addition to its obstruction of delivery as aforesaid, defendant NYME also failed to comply with its own regulations regarding the consequent default in delivery.

35. Plaintiff, in reliance upon said regulations of the NYME, did not sell its cash positions.

36. As a result of the foregoing, the plaintiff has been damaged by defendant NYME in an amount which cannot be presently calculated but which is far in excess of the jurisdictional limit of this Court.

WHEREFORE, Plaintiff demands judgment as follows:

A. On the first cause of action: Money damages in an amount to be calculated by the Court.

B. On the second cause of action: Money damages in an amount to be calculated by the Court and thereafter trebled.

C. On the third cause of action: The attorney's fees of this action that may hereafter be set by this Court.

D. On the fourth cause of action: Money damages in an amount to be calculated by the Court.

E. The costs and disbursements of this action.

F. Such other and further relief as this Court may deem to be proper.

Yours, etc.,

LEONARD TOBOROFF
Attorney for Plaintiff
17 E. 63rd Street
New York, N.Y.
(212) 838-2323

[Affidavit of service omitted]

Complaint in
Neil Leist, et al.* v. *Simplot, et al.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs,

—against—

JOHN RICHARD SIMPLOT, J. R. SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, P. J. TAGGARES & CO., HENRY A. POLLAK, HARVEY B. POLLAK, HARVEY B. POLLAK COMPANY, GERALD RAFFERTY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLICHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, ROBERT EDELSTEIN, MURIEL EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, ROBERT REARDON, F. J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER, HORNBLOWER, WEEKS-HEMPHILL, NOYES, CLAYTON BROKERAGE CO., INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING, INC., HUGH GLENN, GEARHEART FARMING, INC., EDWARD MCKAY, NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI, "JOHN" HUMPHREYS, FRANK FULLMER,

Defendants.

COMPLAINT

PLAINTIFFS DEMAND A JURY TRIAL

Plaintiffs, by their attorneys, BALLON, STOLL & ITZLER, for their complaint allege:

1. Jurisdiction of this Court is invoked by virtue of the provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1-13, the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2, the Clayton Anti-Trust Act, 15 U.S.C. § 15, 28 U.S.C. §§ 1331, 1337 and the doctrine of pendent jurisdiction.

PARTIES

A. *Plaintiffs:*

2. Plaintiff Neil Leist is a duly licensed member of the New York Mercantile Exchange (the "Exchange") engaged in the business of trading commodities and futures contracts for his own account.

3. Plaintiff Incomco, a partnership, is a duly licensed futures commissions merchant.

4. Plaintiff Philip Smith is a principal and the managing partner of Incomco.

B. *Defendants:*

5. Defendant John Richard Simplot is a resident of the State of Idaho and is a principal shareholder, officer and controlling person of defendants J.R. Simplot and Co., Simplot Products Co., Inc., Simplot Industries, Inc., and Simtag Farms, Inc.

6. J.R. Simplot and Co., is a Nevada Corporation with its principal place of business in Boise, Idaho. Simplot Products Co., Inc. is a corporation with its principal place of business in Caldwell, Idaho. Simplot Industries, Inc. is a corporation with its principal place of business in Caldwell, Idaho. Simtag Farm, Inc. is a corporation with its principal place of business in the State of Washington. All of the foregoing corporations are hereinafter referred to as the "Simplot Corporations". The Simplot Corporations are engaged in the business of processing potatoes and potato products throughout the United States.

7. Peter J. Taggares is a resident of the State of Washington and is principal controlling person of defendant P.J. Taggares Co.

8. P.J. Taggares Co. is a sole proprietorship with its principal place of business in Othello, Washington and is engaged in the business of processing potatoes and potato products throughout the United States.

9. Henry A. Pollak is a resident of the State of New York and is a partner in Harvey B. Pollak Company.

10. Harvey B. Pollak is a resident of the State of New York and is a partner of Harvey B. Pollak Company. Harvey B. Pollak at all times relevant hereto was engaged as a Commission Agent for defendant Clayton Brokerage Co., Inc.

11. Harvey B. Pollak Company is engaged in the business of acting as a broker in the sale of commodities and commodity futures. Its business is operated by Henry A. Pollak and Harvey B. Pollak.

12. Gerald Rafferty is a resident of the State of New York and is engaged in the business of trading commodity futures.

13. Pressner Trading Corp. is a New York corporation with its principal place of business in New York, New York and is engaged in the business of acting as a broker in the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commodity Futures Trading Commission (the "Commission").

14. Benjamin Pressner is a resident of the State of New York and is the principal stockholder, officer and controlling person of Pressner Trading Corp.

15. Stephen Sundheimer is a resident of the State of New York and is engaged in the business of trading commodity futures and is an officer of Pressner Trading Corp.

16. Jules Nordlicht is a resident of the State of New York and is engaged in the business of trading commodity futures and is an officer of Pressner Trading Corp.

17. Edelstein & Co., Inc. is a New York corporation with its principal offices at 6 Harrison Street, New York, New York and is engaged in the business as a broker in the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commission.

18. Charles Edelstein is a resident of the State of New York and is a principal officer, stockholder and controlling person of Edelstein & Co., Inc.

19. Robert Edelstein is a resident of the State of New York and is a principal officer, stockholder and controlling person of Edelstein & Co., Inc.

20. Muriel Edelstein is a resident of the State of New York and is a principal officer, stockholder and controlling person of Edelstein & Co., Inc.

21. Meierfeld & Company, Inc. is a New York corporation with its principal place of business in New York, New York and is engaged in business as a broker for the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commission.

22. Gilbert Meierfeld is a resident of the State of New York and is a principal officer, stockholder and controlling person of Meierfeld & Company, Inc.

23. David Meierfeld is a resident of the State of New York and is a principal officer, stockholder and controlling person of Meierfeld & Company, Inc.

24. F. J. Reardon, Inc. is a New York corporation with its principal place of business in New York, New York and is engaged in business as a broker in the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commission.

25. Robert Reardon is a resident of the State of Massachusetts and is a principal officer, stockholder and controlling person of F. J. Reardon, Inc.

26. Harold Collins is a resident of the State of Maine and is engaged in business as a trader in potato futures, and as a potato merchant.

27. Caspar Mayerson is a resident of the State of Maine and is engaged in business as a potato merchant and futures trader.

28. Lynnewood Exporting Company is a partnership or unincorporated association with its principal place of business in the State of New York and was engaged in the business of exporting potatoes and buying and selling potato futures.

29. Alex Sinclair is a resident of the State of Idaho and is engaged in business as a potato merchant and futures trader.

30. Manning Stoller is a resident of the State of Massachusetts and is engaged in business as sales representative.

31. Hornblower, Weeks-Hemphill, Noyes, is a Delaware corporation with its principal offices at 8 Hanover Street, New York, New York and is engaged in business among other things, as a broker in connection with the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commission.

32. Clayton Brokerage Co., Inc. is a Missouri corporation with its principal place of business at St. Louis, Missouri and is engaged in business as a broker in connection with the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commission.

33. Heinold Commodities, Inc. is a New York corporation with its principal place of business at 74 Pearl Street, New York, New York and is engaged in business as a broker in

connection with the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commission.

34. Thomson & McKinnon Auchincloss Kohlmeyer Inc. is a Delaware corporation with its principal place of business at 1 New York Plaza, New York, New York, and is engaged in business as a broker in connection with the sale of commodities and commodity futures. It is a clearing member of the Exchange and is registered with the Commission.

35. MFX Commodities, Inc. is a foreign corporation with its principal place of business in Maine and is engaged in business as a commodity futures commission merchant.

36. Donald Silver is a resident of the State of Maine and is engaged in business as a commodity futures trader and salesman and officer of MFX Commodities, Inc.

37. Duane South is a resident of the State of Idaho and is engaged in business as a commodity trader.

38. Kenneth Ramm is a resident of the State of Washington and is engaged in business as a potato merchant.

39. A & B Farming, Inc. is a foreign corporation with its principal place of business in Washington State and is engaged in business as a potato trader and merchant.

40. Hugh Glenn is a resident of the State of Washington and is a principal officer, stockholder and controlling person of A & B Farming, Inc.

41. Gearheart Farming, Inc. is a Washington corporation with its principal place of business in the State of Washington and is engaged in business as a potato grower and merchant.

42. Edward McKay is a resident of the State of Washington and is a principal officer, stockholder and controlling person of Gearheart Farming, Inc.

43. The Exchange is a New York corporation with its principal place of business in New York City and is a designated contract market pursuant to Section 7 of the Commodity Exchange Act.

44. Richard B. Levine is a resident of the State of New York and is President of the Exchange.

45. Howard Gabler is a resident of the State of New York and is Vice-President of the Exchange.

46. Alfred Pennisi is a resident of the State of New York and is Compliance Officer of the Exchange.

47. "John" Humphreys is a resident of the State of Idaho and is engaged in the business as a salesman for Clayton Brokerage Co.

48. Frank Fullmer is a resident of the State of Idaho and is engaged in business as an officer and employee of J.R. Simplot & Co.

C. *Background:*

49. Maine potatoes are a "commodity" as that term is defined in the Commodity Exchange Act, 7 U.S.C. § 1 *et*

seq. (the "Act") traded and shipped in interstate commerce as are contracts for the future delivery of Maine potatoes. Such contracts are regularly bought and sold in interstate commerce and on the Exchange subject to the Act and the charter, by-laws and rules of the Exchange.

50. A purchaser or seller of potato futures in effect, enters into a contract to either buy or sell potatoes on a fixed delivery date at an agreed upon purchase price. The future contracts are bought and sold at prices which vary in accordance with many factors including the availability of the commodity, weather conditions, etc. Generally the full purchase price on a contract is not payable until the conclusion of trading on the date of delivery but a margin or cash deposit of approximately 10% is required at the time of purchase.

51. Potato futures contracts are standardized, each contract requiring delivery of 50,000 pounds of a specified quality of Maine potatoes at a predetermined location. The contract quantity is approximately that which is required to fill a railcar and is generally referred to as a carload. Prices are quoted in dollars per C.W.T. or cents per pound.

52. Delivery under futures contracts for potatoes are also standardized. The potatoes are deliverable in certain months during the year. The potato futures involved in this action required delivery in March, April and May, 1976 and are referred to herein as the Maine Futures.

53. Trading in Maine Futures commenced on or about February 18, 1975 with the March futures expiring March 5, 1976, the April futures on April 7, 1976 and the May futures on May 7, 1976. Actual delivery or acceptance of

delivery for May Maine Futures pursuant to such contracts was required to take place between May 7, 1976 and May 25, 1976. In lieu of making delivery, short sales and long sales could be offset against each other by buying or selling futures on or before the last trading day.

54. Simplot and the Simplot Companies are responsible for the processing of approximately 50% of all Idaho potato products processed and sold in the United States.

55. Taggares and P. J. Taggares & Co. are responsible for the processing of approximately 30% of all Washington potato products processed and sold in the United States.

56. In connection with their activities, Simplot, the Simplot Companies, Taggares and P. J. Taggares & Co., are the largest purchasers of potatoes throughout Washington, Idaho and Oregon. By virtue of their position in the potato processing field and the quantity of potatoes purchased by them, defendants Simplot, the Simplot Companies, Taggares and P. J. Taggares & Co. would be in a position to control the prices paid for potatoes but for the existence of the Exchange and the activity of merchants, farmers, processors, brokers and traders in buying and selling potato futures contracts. The existence of the Exchange provides an auction market for potatoes and potato futures which thereby determines fair prices.

57. During the period of January through May 1976 various of the defendants and particularly Simplot, the Simplot Companies, Taggares and P. J. Taggares Co. made short sales of substantial quantities of potato futures.

AS AND FOR A FIRST CLAIM AGAINST DEFENDANTS JOHN RICHARD SIMPLOT, J. R. SIMPLOT & CO., PETER J. TAGGARES, P. J. TAGGARES CO., HENRY A. POLLAK, HARVEY B. POLLAK, HARVEY B. POLLAK COMPANY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLICHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, F. J. REARDON, INC., ROBERT REARDON, HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, EMANUEL STOLLER, HORNBLOWER, WEEKS-HEMPHILL, NOYES, CLAYTON BROKERAGE CO., INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING, INC., HUGH GLENN, GEARHEART FARMING, INC., EDWARD MCKAY, "JOHN" HUMPHREYS, FRANK FULLMER.

58. From on or about December 1, 1975 up to and including June 30, 1976 in the Southern District of New York and elsewhere, the defendants John Richard Simplot, J. R. Simplot & Co., Peter J. Taggares, P. J. Taggares Co., Henry A. Pollak, Harvey B. Pollak, Harvey B. Pollak Company, Pressner Trading Corp., Benjamin Pressner, Stephen Sundheimer, Jules Nordlicht, Edelstein & Co., Inc., Charles Edelstein, Meierfeld & Company, Inc., Gilbert Meierfeld, David Meierfeld, F. J. Reardon, Inc., Robert Reardon, Harold Collins, Caspar Mayerson, Lynnewood Exporting Company, Alex Sinclair, Emanuel Stoller, Hornblower, Weeks-Hemphill, Noyes, Clayton Brokerage Co., Inc., Heinold Commodities, Inc., Thomson & McKinnon Auchincloss Kohlmeyer Inc., MFX Commodities, Inc., Donald Silver, Duane South, Kenneth Ramm, A & B Farming, Inc., Hugh Glenn, Gearheart Farming, Inc., Edward

McKay, "John" Humphreys, Frank Fullmer and others to the plaintiffs presently unknown did unlawfully, willfully, knowingly and maliciously combine, conspire, confederate and agree, together and with each other to commit violations of Federal law, to wit violations of Title 7 U.S.C. §§ 1 through 13.

59. It was part of said conspiracy that the above named defendants and their co-conspirators would unlawfully, willfully, and knowingly and maliciously in connection with the purchase and sale of Maine Futures by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly and indirectly, employed devices, schemes and artifices to defraud and engaged in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers and sellers of Maine Futures.

60. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully, knowingly and maliciously, in connection with the purchase and sale of Maine Futures, directly and indirectly, by the use of means and instrumentalities of interstate commerce and the mails, used and employed manipulative devices and contrivances in violation of Title 7 U.S.C. § 13 and Rules promulgated by the Commission.

61. It was further a part of the conspiracy that in order to reduce or eliminate any losses on their short sales, defendants conspired to and did manipulate the market price of Maine Futures for the purpose of creating an artificially low price for such Maine Futures.

62. Among the means by which defendants carried out the conspiracy were the following:

(a) Defendants Simplot, Taggares and their co-conspirators sold short and caused to be sold short Maine Futures despite their knowledge that there were insufficient quantities of such potatoes available to satisfy their contracts and despite their knowledge of the fact that there were insufficient railroad cars available to make delivery of the potatoes even if they were successful in purchasing such potatoes.

(b) In order to protect their short positions in Maine Futures by depressing the price of potatoes defendants and their co-conspirators shipped unsold Idaho potatoes to the market in large quantities for immediate sale and transferred or caused to be transferred carloads of potatoes from market to market and offered them for immediate sale at the going cash price, at a time when there were no buyers available.

(c) Although they knew that there were insufficient Maine potatoes available to fill their short sales and that there were insufficient cars available to deliver the potatoes which were required to satisfy their obligations under their short contracts, defendants failed and refused to enter liquidating orders for approximately 1911 Maine Futures contracts.

(d) Defendants Simplot and Taggares and their co-conspirators refused to offset any of their short sales of Maine Futures against existing long contracts for Maine Futures as a result of which, since they were unable to make delivery of potatoes under their contracts, they defaulted or caused defaults under con-

tracts involving at least 1911 carloads of Maine potatoes.

(e) Defendants Simplot and Taggares and their co-conspirators failed to report or caused the brokers who handled their short sales of Maine Futures to fail to report to the Commission violations of the Act, the Rules and Regulations of the Commission, and the By-Laws, Rules and Regulations of the Exchange and concealed or caused to be concealed such violations from the Commission.

(f) Defendants Simplot, Taggares, Reardon and their co-conspirators sold or caused to be sold Maine Futures in concert with each other at times and for prices which were prearranged to have the maximum impact on the market.

(g) The defendant brokers failed and neglected to enter liquidating orders for Maine Futures on or before May 7, 1976 with respect to accounts which maintained short positions even though they knew that such short positions could not be covered and that there would be a default if the accounts were not closed out.

(h) Defendant brokers permitted the short sales of Maine Futures to be made and cooperated in making such short sales although they knew or should have known that the sellers did not intend to and would be unable to cover such short positions.

63. As a result of the foregoing, the price of Maine Futures was artificially lowered, resulting in damages to the plaintiff Philip Smith in the amount of $400,000, to the plaintiff Incomco in the amount of $400,000, and to the plaintiff Neil Leist in the amount of $500,000.

AS AND FOR A SECOND CLAIM AGAINST DEFENDANTS JOHN RICHARD SIMPLOT, J. R. SIMPLOT & CO., PETER J. TAGGARES, P. J. TAGGARES CO., HENRY A. POLLAK, HARVEY B. POLLAK, HARVEY B. POLLAK COMPANY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLICHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIRRFELD, DAVID MEIERFELD, F. J. REARDON, INC., ROBERT REARDON, HAROLD COLLINS, CASPAR MAYERSON, ALEX SINCLAIR, EMANUEL STOLLER, HORNBLOWER, WEEKS-HEMPHILL, NOYES, CLAYTON BROKERAGE CO., INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING, INC., HUGH GLENN, GEARHEART FARMING, INC., EDWARD MCKAY, "JOHN" HUMPHREYS, FRANK FULLMER.

64. From on or about December 1, 1975 up to and including June 30, 1976, in the Southern District of New York and elsewhere the defendants John Richard Simplot, J. R. Simplot & Co., Peter J. Taggares, P. J. Taggares Co., Henry A. Pollak, Harvey B. Pollak, Harvey B. Pollak Company, Pressner Trading Corp., Benjamin Pressner, Stephen Sundheimer, Jules Nordlicht, Edelstein & Co., Inc., Charles Edelstein, Meierfeld & Company, Inc., Gilbert Meierfeld, David Meierfeld, F. J. Reardon, Inc., Robert Reardon, Harold Collins, Caspar Mayerson, Alex Sinclair, Emanuel Stoller, Hornblower, Weeks-Hemphill, Noyes, Clayton Brokerage Co., Inc., Heinold Commodities, Inc., Thomson & McKinnon Auchincloss Kohlmeyer Inc., MFX Commodities, Inc., Donald Silver, Duane South, Kenneth Ramm, A & B Farming, Inc., Hugh Glenn, Gearheart Farming, Inc., Edward McKay, "John" Humphreys, Frank Fullmer

and others to the plaintiffs presently unknown, did unlawfully, willfully, knowingly and maliciously combine, conspire, confederate and agree together and with each other to commit violations of Federal Law to wit violations of Title 15 U.S.C. §§1 and 2.

65. It was part of said conspiracy that the above named defendants and their co-conspirators would unlawfully, willfully, knowingly and maliciously in connection with the purchase and sale of May Futures and Maine potatoes agree to and take steps to restrain trade and commerce among the several states and with foreign nations.

66. It was further a part of said conspiracy that the above named defendants and their co-conspirators would unlawfully, willfully, knowingly and maliciously monopolize and attempt to monopolize trade and commerce in May Futures and Maine potatoes among the several states and with foreign nations.

67. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully, knowingly and maliciously would seek to destroy the Exchange as a factor in the trading of future contracts for the purchase of potatoes in the future and thereby to eliminate all competition in the marketplace for the purchase and sale of potatoes, thereby providing for the defendants and their co-conspirators a monopoly position in connection with the acquisition of potatoes.

68. Among the means by which defendants carried out the conspiracy were the following:

(a) Defendants Simplot, Taggares and their co-conspirators sold short and caused to be sold short

May Futures despite their knowledge that there were insufficient quantities of such potatoes available to satisfy their contracts and despite their knowledge of the fact that there were insufficient railroad cars available to make delivery of the potatoes even if they were successful in purchasing such potatoes.

(b) Defendants Simplot, Taggares and their co-conspirators, in order to depress the cash market price of potatoes in New York, shipped unsold Idaho potatoes to the market in large quantities for immediate sale.

(c) Defendants Simplot, Taggares and their co-conspirators transferred or caused to be transferred from market to market and offered for immediate sale at the going cash price, carloads of potatoes at a time when there were no buyers available.

(d) Although they knew that there were insufficient Maine potatoes available to fill their short sales and that there were insufficient cars available to deliver the potatoes which were required to satisfy their obligations under their short contracts, defendants Simplot, Taggares and their co-conspirators failed and refused to enter liquidating orders for a total of 1911 Maine Futures contracts.

(e) Defendants refused to set their short sales of May Futures against existing long contracts for May Futures as a result of which, since they were unable to make delivery of potatoes under their contracts, they defaulted or caused defaults under contracts involving at least 1911 carloads of Maine potatoes.

(f) Defendants failed to report or caused the brokers who handled their short sales of Maine Futures

to fail to report to the Commission violations of the Act, the Rules and Regulations of the Commission, and the By-Laws, Rules and Regulations of the Exchange and concealed or caused to be concealed such violations from the Commission.

(g) The defendant brokers failed and neglected to enter liquidating orders for Maine Futures on or before May 7, 1976 with respect to accounts which maintained short positions even though they knew that such short positions could not be covered and that there would be a default if the accounts were not closed out.

(h) Defendant brokers permitted the short sales of Maine Futures to be made and cooperated in making such short sales although they knew or should have known that the sellers did not intend to and would be unable to cover such short positions.

69. As a result of the foregoing acts of the defendants and their co-conspirators plaintiffs have sustained substantial damages and are entitled to recover three-fold the damages sustained by them together with the costs of this action including a reasonable attorney's fee.

AS AND FOR A THIRD CLAIM AGAINST DEFENDANTS ROBERT REARDON, F. J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER and HORNBLOWER, WEEKS-HEMPHILL, NOYES.

70. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 58 through 62, and 64 through 68.

71. Defendants with knowledge of the existence of the conspiracies alleged above for purposes of personally profiting from the existence of the conspiracy simultaneously with their participation in the aforementioned conspiracy entered into a conspiracy of their own to commit violations of federal law, to wit violations of Title 7, United States Code §§ 1 through 13. Such conspiracy occurred within the Southern District of New York and elsewhere during the period December 1, 1975 through June 30, 1976.

72. It was part of said conspiracy that simultaneously with participating with and assisting the co-conspirators named in the First and Second Causes of Action herein in the short sale of Maine Futures, defendants would purchase or cause to be purchased potatoes and Maine Future for the purpose of creating an artificially high price in the market. It was further a part of said conspiracy that defendants would purchase or cause to be purchased, potatoes and Maine Futures although they did not have sufficient resources to meet their contract obligations.

73. It was further a part of such conspiracy that the brokers for whom such purchases were made would permit the purchases to be made on credit with full knowledge that defendants who were making the purchases or their agents did not have the resources to meet their obligations.

74. The acts of defendants were done willfully, knowingly and maliciously.

75. As a result of the foregoing acts of the defendants, plaintiffs have sustained damages in excess of $400,000.

As and for a Fourth Claim Against Defendants New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi.

76. Plaintiff repeats and realleges each and every allegation contained in paragraphs 58 through 62, 64 through 68.

77. Defendant Exchange was required by law to regulate activities of brokers and traders in the trading of commodities on the New York Mercantile Exchange and specifically, trading in Maine Futures.

78. The activities of the defendant Exchange were the responsibility of the defendants Levine, Gabler and Pennisi as the President, Vice President and Compliance Officer respectively of the Exchange.

79. Defendants Exchange and Levine, Gabler and Pennisi negligently failed to maintain an orderly market for trading in Maine Futures in violation of the duties imposed upon them under the provisions of the Act.

80. Defendant Exchange and Levine, Gabler and Pennisi failed and neglected to report violations of the Act and the Rules and Regulations of the Commission and the By-Laws, Rules and Regulations of the Exchange.

81. Defendant Exchange and Levine, Gabler and Pennisi failed and neglected to direct the entry of liquidating orders for the Maine Futures which had been sold short for the accounts of members with net short positions, on or before May 7, 1976 although they knew or should have known that the sellers of Maine Futures would not and could not make delivery under their agreement.

82. The defendant Exchange and the defendants Levine, Gabler and Pennisi failed and neglected to exercise due care in policing activities of traders and brokers in connection with the purchase and sale of Maine Futures and thereby failed to prevent the manipulative practices by the various other defendants named in this complaint and their co-conspirators.

83. As a result of the foregoing, plaintiffs have each been injured and have sustained damages in excess of $400,000.

WHEREFORE, it is respectfully requested that plaintiffs have judgment as follows:

On the First Claim

To the plaintiff Leist in the amount of $500,000 together with punitive damages, interest according to law and the costs of the action.

To the plaintiff Smith in the amount of $400,000 together with punitive damages, with interest according to law and the costs of this action.

To the plaintiff Incomco in the amount of $00,000 [*sic*] together with punitive damages, with interest according to law and the costs of this action.

On the Second Claim

To the plaintiff Leist in the amount of $1,500,000 together with interest according to law, reasonable attorneys fees and the costs of this action.

To the plaintiff Smith in the amount of $1,200,000 together with interest according to law, reasonable attorneys fees and the costs of this action.

To the plaintiff Incomco in the amount of $1,200,000 together with interest according to law, reasonable attorneys fees and the costs of this action.

On the Third Claim

To the plaintiff Leist in the amount of $500,000 together with interest according to law, punitive damages and the costs of this action.

To the plaintiff Smith in the amount of $400,000 together with interest according to law, punitive damages and the costs of this action.

To the plaintiff Incomco in the amount of $400,000 together with interest according to law, punitive damages and the costs of this action.

On the Fourth Claim

To the plaintiff Leist in the amount of $500,000 together with interest according to law, punitive damages and the costs of this action.

To the plaintiff Smith in the amount of $400,000 together with interest according to law, punitive damages and the costs of this action.

To the plaintiff Incomco in the amount of $400,000 together with interest according to law, punitive damages and the costs of this action.

BALLON, STOLL & ITZLER

By: .....
MORTON S. ROBSON

Office and P.O. Address
1180 Avenue of the Americas
New York, New York 10036
(212) 575-7900

[Affidavit of service omitted]

First Amended Consolidated Class Action Complaint in *National Super Spuds, Inc., et al.* v. *New York Mercantile Exchange, et al.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs,

—against—

NEW YORK MERCANTILE EXCHANGE; CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.; HEINOLD COMMODITIES, INC.; THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.; PRESSNER TRADING CORP.; JACK RICHARD SIMPLOT; J. R. SIMPLOT CO.; SIMPLOT INDUSTRIES, INC.; PETER J. TAGGARES; P. J. TAGGARES CO.; C. L. OTTER; SIMTAG FARMS; KENNETH RAMM; A & B FARMS, INC.; HUGH V. GLENN; GEARHEART FARMING, INC. and ED MCKAY,

Defendants.

FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

76 Civ. 2375 (LFM)
76 Civ. 2554 (LFM)
76 Civ. 2571 (LFM)
76 Civ. 2594 (LFM)

Plaintiffs, by their attorneys, for their first amended consolidated class action complaint, allege:

I. Jurisdiction and Venue

First: This action arises under the Commodity Exchange Act of 1922, as amended, 7 U.S.C. § 1 *et. seq.* ("the Commodity Act"), the rules and regulations of the Commodity Futures Trading Commission ("CFTC") 17 C.F.R. § 1.1 *et. seq.*, the Charter, By-Laws and Rules adopted by the defendant New York Mercantile Exchange ("Exchange") and the Sherman Anti-Trust Act, § 1 *et. seq.* ("the Sherman Act").

Second: Jurisdiction of this action to recover damages is based upon 28 U.S.C. § 1337; and § 4 of the Clayton Act, 15 U.S.C. § 15.

Third: (a) The commodity transactions complained of took place within the jurisdiction of the United States Court for the Southern District of New York, and each of the defendants is found in and/or participated in business activities relevant to this action within said district.

(b) The acts complained of herein occurred in interstate commerce and were accomplished through the use of the instrumentalities of interstate commerce.

II. Parties

Fourth: Each of the named plaintiffs purchased May 1976 Maine Potato Future Contracts ("Contract" or "Contracts") on the Exchange and was damaged in liquidating said Contracts between April 13, 1976 and the close of trading on the Exchange on May 7, 1976.

Fifth: Defendant Exchange is a corporation organized and existing pursuant to the laws of the State of New York,

having its principal place of business at 6 Harrison Street, New York, New York, and is a "contract market" designated pursuant to § 5 of the Commodity Act (7 U.S.C. § 7) through which transactions for the future delivery of commodities may be consummated.

Sixth: (a) Defendant Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold"), and Thomson & McKinnon Auchincloss Kohlmeyer Inc. ("Thomson & McKinnon"), corporations who have places of business at, respectively, 1 World Trade Center, New York, New York, 74 Pearl Street, New York, New York, and One New York Plaza, New York, New York, are members of the Exchange, members of the Exchange's Clearing House, and are also "members of a contract market" and "futures commissions merchants" as these terms are defined in the Commodity Act. At the close of trading on the Exchange on May 7, 1976, Clayton, Heinold and Thomson & McKinnon all had accounts that held a short position in the Contract.

(b) Defendant Pressner Trading Corp. ("Pressner"), a corporation, with a place of business at 6 Harrison Street, New York, New York, is a member of the Exchange, a member of the Exchange's Clearing House, and is also a "member of a contract market" and "futures commissions merchants" as these terms are defined in the Commodity Act. At the close of trading on the Exchange on May 7, 1976, Pressner had accounts that held a short position in the Contract.

(c) Defendants Clayton, Heinold, Thomson & McKinnon and Pressner are hereinafter collectively referred to as "the Members".

Seventh: (a) Defendant Jack Richard Simplot ("Simplot") is an individual residing in the State of Idaho. He conducts business through defendant, J. R. Simplot Co., a Nevada corporation which has its principal place of business in Boise, Idaho, and through defendant, Simplot Industries, Inc., a Utah corporation which has its principal place of business in the State of Idaho.

(b) Defendant C. L. Otter ("Otter") is an individual and and citizen and resident of the State of Idaho. Otter is the Vice-President of defendant Simplot Industries, Inc. and is the son-in-law of defendant Simplot.

(c) Defendant Peter J. Taggares ("Taggares") is an individual residing in the State of Washington. He conducts business through a corporation known as P. J. Taggares Co., which defendant has its principal place of business in Othello, Washington.

(d) Defendant Simtag Farms is a partnership between Simplot and Taggares, having its principal place of business located in Boardam, Oregon.

(e) Defendants Kenneth Ramm ("Ramm"), Hugh V. Glenn ("Glenn") and Ed McKay ("McKay") are all individuals residing in Othello, Washington. Defendant A & B Farms, Inc. ("A & B") and defendant Gearheart Farming, Inc. ("Gearheart") are both Washington corporations, with their principal place of business located in Othello, Washington.

(f) Defendants Simplot, Otter, J. R. Simplot Co., Simplot Industries, Inc., Peter J. Taggares, P. J. Taggares Co., Simtag Farms, Ramm, Glenn, McKay, A & B and Gear-

heart are hereinafter collectively referred to as the "Short Sellers".

III. Plaintiffs' Class Allegations

Eighth: Plaintiffs bring their action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of themselves and all other persons who held a net long position in Contracts and who liquidated their long positions in said Contract between April 13, 1976 *and* the close of trading on the Exchange on May 7, 1976.

Ninth: Plaintiffs do not know the exact size of the class but believe the numerosity of the members of the class is so great that, coupled with the fact that members are located throughout the United States, it is impracticable to bring them all before the Court.

Tenth: The questions of fact and law common to all members of the class include:

(a) Whether the Short Sellers, individually or in concert, engaged in manipulative practices which were designed to artificially lower the trading price of the Contract in violation of § 4b (7 U.S.C. § 6) and/or § 9 [7 U.S.C. § 13 (b)] of the Commodity Act and § 1 of the Sherman Act, 15 U.S.C. § 1, including, but not limited to:

(i) From at least as early as April 13, 1976, through May 7, 1976, acting in unison to sell short additional Contracts at any price in order to depress the market price of said Contracts.

(ii) From at least as early as April 13, 1976, through May 7, 1976, acting in unison by shipping large quanti-

ties of unsold Idaho potatoes to the East by "roller cars" or otherwise in order to reduce the "spot price" for Maine potatoes and thereby artificially depress the market price of said Contract.

(iii) From at least as early as April 13, 1976, through May 7, 1976, acting in unison by failing and refusing to liquidate their Contracts on or before May 7, 1976.

(b) Whether the Members engaged in manipulative practices which were designed to artificially lower the trading price of the Contract in violation of §4b (7 U.S.C. §6) and/or §9 [7 U.S.C. §3(b)] of the Commodity Act and §1 of the Sherman Act, 15 U.S.C. § 1?

(c) Whether the Exchange is liable for the manipulative practices of Short Sellers and/or Members in artificially lowering the trading price of the Contract by failing to enforce its Charter, By-Laws and Rules in violation of §5a(8) of the Commodity Act [7 U.S.C. §7a(8) and §1.53 of the rules and regulations of the CFTC (17 C.F.R. §1.53)] and in failing to use due diligence as required by §1.51 of the rules and regulations of the CFTC (17 C.F.R. §1.51) to secure compliance with the Commodity Act and its own Charter, By-Laws and Rules?

(d) Whether Short Sellers and/or Members entered into short sales of the Contract in excess of the trading limits imposed by §150.10 of the rules and regulations of the CFTC (17 C.F.R. §150.10), thereby artificially lowering the trading price of the Contract?

(e) Whether the Exchange and its Members are liable for failing to enforce the trading limits imposed by §150.10

of the rules and regulations of the CFTC (17 C.F.R. §150.10), with respect to short sales of the Contract?

(f) Whether there was a violation of §44.02 of the Charter, By-Laws and Rules of the Exchange by Members in failing to place liquidating orders for customers with a short position in the Contract?

(g) Whether Short Sellers who failed to liquidate their short positions in the Contract on or before the final day of trading when they were not in a position to fulfill their contractual obligation to deliver, engaged in a manipulative practice in violation of §4b of the Commodity Act (7 U.S.C. §6b) and/or §9b of the Commodity Act [7 U.S.C. §13(b)] thereby artificially lowering the trading price of the Contract?

(h) Whether the Exchange is liable for the failure of the Members to place liquidating orders for short positions held in the Contract?

These common questions of law and fact predominate over any questions affecting only individual members of the class. The only uncommon question is the actual dollar amount of damage to which each class member is entitled.

Eleventh: The claims of plaintiffs are typical of the claims of all members of the class. All members of the class have an identical interest in seeking damages for the claims alleged herein. The damages suffered by plaintiffs insure that they will be sufficiently motivated to adequately and fairly represent the members of the class. Moreover, plaintiffs' counsel are experienced in the class action and anti-trust fields lending to the fair and adequate representation of the class.

Twelfth: (a) This class action is superior to other available methods for fair and efficient adjudication of this controversy in that the interest of the individual members of the class (the amount of damages individually suffered) are small in comparison with the expense involved in the vindication of these interests so that the maintenance of individual actions is impractical and a class action represents the only effective method.

(b) It is desirable to concentrate the litigation in the forum in which many of the acts and practices relevant to the claim of the class occurred and in which the Exchange is located. No difficulties of management are likely to be encountered, particularly since individual transactions of class members can be documented by records required to be maintained and filed pursuant to the Commodity Act.

IV. Facts

Thirteenth: Maine grown potatoes are a commodity regularly bought and sold for future delivery subject to the Charter, By-Laws and Rules of the Exchange. Contracts for future delivery of Maine potatoes (commonly known as "potato futures") have been and are regularly bought and sold in interstate commerce. These potato futures are standardized in that each Contract calls for delivery of a fixed quantity of 50,000 pounds, sometimes referred to as a carload, of a specified quality of Maine potatoes at a predetermined location. Prices are quoted in dollars per hundred weight ("cwt") or cents per pound. The times of delivery are also standardized. Potato futures are deliver-

able in certain months during the year. This action involves potato futures that were deliverable in May, 1976, also known as the May 1976 Maine Potatoes Future Contract ("Contract"). When one buys or sells May potato futures, one enters into a Contract to buy or sell potatoes deliverable in May at a price agreed upon on the purchase date. Prices quoted on the Exchange are supposed to represent, and usually represent, genuine transactions, and as the quoted price rises or falls, the buyers and sellers have unrealized profits or losses in their futures. The full purchase price is not payable until the conclusion of trading (i.e., May 7, 1976 in this case), but buyers and sellers are required to post a cash deposit, or margin (approximately 10% of the total price), when they make the trade.

Fourteenth: Trading on or through the Exchange for the 1975 crop of Maine grown potatoes was conducted for Contracts providing for delivery in November, 1975, March, 1976, April, 1976 and May, 1976, with the last of the 1975 Maine potato crop being delivered pursuant to the May Contract.

Fifteenth: Trading in the May 1976 Maine Potato Future Contract (also referred to herein as the "Contract"), commenced on or about February 18, 1975 and, pursuant to § 51.01 of the Charter, By-Laws and Rules of the Exchange, trading closed on May 7, 1976.

Sixteenth: During the period of February 18, 1975 through May 7, 1976, plaintiffs and the members of the class bought one or more Contracts (50,000 lbs.) of May 1976 Maine Potato Futures, thereby holding net long positions.

Seventeenth: Throughout its trading, the Contract had a wide price fluctuation reflected by a low of $5.92 per cwt ($.0592 per pound) and a high of $19.15 per cwt ($.1915 per pound), with a closing price on May 7, 1976 of $8.70 per cwt ($.087 per pound).

Eighteenth: April 7, 1976 was the last day of trading for the April 1976 Maine Potato Future Contract. At the close of business on the Exchange on April 7, 1976, there were 511 open April 1976 Maine Potato Future Contracts which required the delivery of approximately 25.5 million pounds of Maine potatoes on or before April 25, 1976. On that same date, there were 7471 open May 1976 Maine Potato Future Contracts which, if not liquidated on or before May 7, 1976, required the delivery of more than 373.5 million pounds of Maine potatoes on or before May 25, 1976.

Nineteenth: (a) On or about April 13, 1976, the United States Department of Agriculture issued a Report that stocks of Maine potatoes in storage totalled 7.40 million cwt on April 1, 1976. The Report was considered very bullish, because the normal consumption of Maine potatoes in April is 2.5 to 3.0 million cwt, seed usage for the next planting would require approximately 3.6 million cwt, and exports were expected to total approximately 1.0 million cwt. Moreover, the Report stated that total stocks of all potatoes in storage were only 67.3 million cwt on April 1, 1976, 11% under the 75.9 million cwt stocked on April 1, 1975.

(b) Said Report, when coupled with other generally available information with respect to the projected need for Maine potatoes for export and other uses, provided the

Members, Short Sellers and the general investing public, with a sound basis for determining the quantities of Maine potatoes that would be available to satisfy delivery obligations existing in connection with the May 1976 Maine Potato Future Contract upon its expiration on May 7, 1976.

Twentieth: At the close of business on the Exchange on May 7, 1976, the Members and Short Sellers (other than Otter) were short 1911 Contracts which required delivery of more than 95 million pounds of Maine potatoes no later than May 25, 1976. The Members (other than Pressner) and Short Sellers (other than Otter) have defaulted on 1000 of these Contracts requiring delivery of 50 million pounds of Maine potatoes. Defendant Pressner covered all of its short positions between May 7, 1976 and May 25, 1976, by paying a premium in excess of the Contracts' closing price of $8.70 per cwt ($.087 per pound), while Otter knowingly participated in, and was partly responsible for, the decision of Simplot and/or J. R. Simplot Co., and/or Simplot Industries, Inc. and/or Simtag to default on Contracts.

COUNT I

As and for a Second Claim for Relief Against Jack Richard Simplot; J. R. Simplot Co.; Simplot Industries, Inc.; C. L. Otter; Peter J. Taggares; P. J. Taggares Co.; Simtag Farms; Kenneth Ramm; A & B Farms, Inc.; Hugh V. Glenn; Gearheart Farming, Inc. and Ed McKay.

Twenty-First: Plaintiffs repeat and reiterate all of the allegations contained in paragraphs "First" through "Twentieth" as if fully set forth herein.

Twenty-Second: In August, 1975, the United States Department of Agriculture issued a Report which contained its first estimate of the number of acres that farmers would have to harvest in their Fall potato crop. This estimate stated that the national potato acreage would be down eight percent (8%) from the previous year with an even larger drop in Maine. As a result of said Report, and other information which led the investing public to believe Maine potatoes would be in short supply, the price of the Contract rose from $9.75 per cwt ($.0975 per pound) to a record price of $19.15 per cwt ($.1915 per pound) by October 3, 1975.

Twenty-Third: From August, 1975 through April 13, 1976, the Short Sellers executed a large volume of short sales of the Contract at prices considerably in excess of $8.70 per cwt ($.087 per pound).

Twenty-Fourth: On or about April 13, 1976, based on publicly available information, it was known or should have been known to Short Sellers that there was an insufficient number of Maine grown potatoes available in the United States or elsewhere to satisfy all open commitments for the Contract through delivery of Maine potatoes.

Twenty-Fifth: On the final day of trading of the Contract on the Exchange and prior thereto, Short Sellers failed to have liquidating orders placed, despite knowledge of their inability or unwillingness to fulfill their obligation to deliver Maine potatoes as required by the Contract and thereafter Short Sellers (other than Otter) defaulted on

said Contracts. In addition, on the final day of trading, sellers entered into sales of the Contract.

Twenty-Sixth: These activities by Short Sellers which violated the applicable provisions of the Commodity Act acted as a manipulative force which artificially lowered the price of the Contract.

Twenty-Seventh: Had Short Sellers acted properly by liquidating their short positions, the market price for the Contract would have risen considerably above the price at which plaintiffs and members of the class were forced to liquidate their long position.

Twenty-Eighth: By virtue of the foregoing, plaintiffs and members of the class have been damaged in an amount as yet undetermined but believed to be many millions of dollars.

COUNT II

AS AND FOR A SECOND CLAIM FOR RELIEF AGAINST JACK RICHARD SIMPLOT; J. R. SIMPLOT CO.; SIMPLOT INDUSTRIES, INC.; C. L. OTTER; PETER J. TAGGARES; P. J. TAGGARES, CO.; SIMTAG FARMS; KENNETH RAMM; A & B FARMS, INC.; HUGH V. GLENN; GEARHEART FARMING, INC. and ED MCKAY.

Twenty-Ninth: Plaintiffs repeat and reiterate each and every allegation contained in paragraphs "First" through "Twentieth", "Twenty-Third" and "Twenty-Fourth" as if fully set forth herein.

Thirtieth: On or about April 13, 1976, the United States Department of Agriculture issued a Report that stocks of Maine potatoes in storage totalled 7.40 million cwt on April 1, 1976. The Report was considered very bullish, because the normal consumption of Maine potatoes in April is 2.5 to 3.0 million cwt, seed usage for the next planting would require approximately 3.6 million cwt, and exports were expected to total approximately 1.0 million cwt. Moreover, the Report stated that total stocks of all potatoes in storage were only 67.3 million cwt on April 1, 1976, 11% under the 75.9 million cwt stocked on April 1, 1975. As of April 1, 1976, there were approximately 8,000 open Contracts of May 1976 Maine potatoes requiring delivery of 4.0 million cwt. The next trading day prices for May 1976 Maine Potato Futures rose significantly.

Thirty-First: In order to counteract the effect of the Agriculture Department Reports and to depress the price of May 1976 Maine Potato Futures, Short Sellers engaged in the following manipulative acts in violation of the Commodity Act to reduce the price of May 1976 Potato Futures:

(a) From at least as early as April 13, 1976 through May 7, 1976, Short Sellers exceeded the position and trading limits imposed by § 150.10 of the Rules and Regulations of the CFTC (17 C.F.R. § 150.10).

(b) On or about April 13, 1976, Short Sellers sent one or more roller cars of potatoes moving East, knowing that they did not have any customer or buyer for those potatoes. Roller cars are railroad carloads of potatoes that are shipped from market to market and offered for immediate sale at the going cash price (i.e., the price for immediate

delivery). Normally, shippers dispatch carloads only when they have buyers for them. The arrival of roller cars at a market tends to depress prices, and shippers often send them out for that very purpose.

(c) On or about April 13, 1976, Short Sellers and other persons unknown to plaintiff entered into an understanding and agreement to sell May 1976 Maine Potato Futures into the market at any price, which they did immediately thereafter.

(d) As early as April 13, 1976, Short Sellers knew, or should have known that there was an insufficient number of Maine grown potatoes available in the United States or elsewhere to permit them to make delivery on or before May 25, 1976 of such potatoes to satisfy all of their open short positions. Nonetheless prior to and on the final day of trading, May 7, 1976, Short Sellers entered into an understanding and agreement pursuant to which they failed and refused to have liquidating orders filed.

(e) After the close of trading on May 7, 1976, there were approximately 1,900 open short positions. Short Sellers then acknowledged that they could not make delivery pursuant to their open short positions, and as of May 25, 1976, defaulted on 1,000 carloads of Maine potatoes.

(f) Short Sellers delivered for transmission through the mails and in interstate commerce by telephone and other means of communication false, misleading and knowingly inaccurate market information concerning Maine potatoes.

Thirty-Second: The conduct of Short Sellers was intended to and did artificially lower the price of May 1976

Maine Potato Futures during the period of at least April 13, 1976 through May 7, 1976 in violation of the Commodity Act.

Thirty-Third: In closing out or offsetting their open long positions at the artificially low price manipulated by Short Sellers, plaintiff and the members of the class have been damaged in an amount as yet undetermined but believed to be many millions of dollars.

COUNT III

AS AND FOR A THIRD CLAIM FOR RELIEF AGAINST JACK RICHARD SIMPLOT; J. R. SIMPLOT CO.; SIMPLOT INDUSTRIES, INC.; C. L. OTTER; PETER J. TAGGARES; P. J. TAGGARES CO.; SIMTAG FARMS; KENNETH RAMM; A & B FARMS, INC.; HUGH V. GLENN; GEARHEART FARMING, INC. and ED MCKAY.

Thirty-Fourth: Plaintiffs repeat and reiterate each and every allegation contained in paragraphs "First" through "Twentieth", "Twenty-Third", "Twenty-Fourth", and "Thirtieth" through "Thirty-Second", as if fully set forth herein.

Thirty-Fifth: Short Sellers have combined and conspired with each other and with others presently unknown to plaintiffs in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, to manipulate the supply and the market price of potatoes in the United States, to manipulate and to artificially depress the price of the Contract, to refuse to close out their open short positions in May 1976 Maine Potatoes Futures

on or before May 7, 1976, and to do the various acts, *inter alia,* as alleged in paragraph "Thirty-First" hereof.

Thirty-Sixth: The aforesaid combination and conspiracy was intended to and did artificially lower the price of May 1976 Maine Potato Futures during the period of at least April 13, 1976 through May 7, 1976.

Thirty-Seventh: As a result of the aforesaid combination and conspiracy, plaintiffs and all members of the class have been injured in that they were required to sell their May 1976 Maine Potato Futures during the period of at least April 13, 1976 through May 7, 1976 at artificially low prices, prices substantially lower than they would have been paid in the absence of said combination and conspiracy.

Thirty-Eighth: Plaintiffs and all members of the class accordingly have been injured in their business and property as a result of said combination and conspiracy, in amounts as yet undetermined but believed to be in the many millions of dollars.

COUNT IV

As and for a First Claim for Relief Against Clayton Brokerage Co. of St. Louis, Inc.; Heinold Commodities, Inc.; Thomson & McKinnon Auchincloss Kohlmeyer Inc.; and Pressner Trading Corp.

Thirty-Ninth: Plaintiffs repeat and reiterate each and every allegation contained in paragraphs "First" through "Twentieth", "Twenty-Third", "Twenty-Fourth", "Twenty-Fifth" and "Thirtieth", as if fully set forth herein.

Fortieth: (a) On or before the final day of trading of the Contract on May 7, 1976, Members failed, as required by § 44.02 of the Charter, By-Laws, Rules and Regulations of the Exchange to have liquidating orders placed, despite the fact that they knew or should have known that their account or accounts could not fulfill their obligation to deliver Maine potatoes.

(b) Members also permitted the Short Sellers to exceed the position and trading limits imposed by the Commodity Act and Regulations of the CFTC as aforesaid and failed to report these violations.

(c) Members also failed and neglected to report and concealed other violations of the Commodity Act, Rules and Regulations of the Commission, and By-Laws, Rules and Regulations of defendant Exchange by one or more of their accounts with respect to the Contract, of which they knew or should have known.

Forty-First: These acts by Members directly affected the price of the Contract which was artificially depressed as a result thereof.

Forty-Second: Had Members acted in accordance with the Commodity Act, and the Charter, By-Laws, Rules and Regulations of the Exchange, the market price of the Contract would have risen considerably above the price at which plaintiffs and members of the class were forced to liquidate their long position.

Forty-Third: By reason of the foregoing, plaintiffs and members of the class have been damaged in an amount as

yet undetermined but believed to be in the many millions of dollars.

COUNT V

AS AND FOR A SECOND CLAIM FOR RELIEF AGAINST CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.; HEINOLD COMMODITIES, INC.; THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC. and PRESSNER TRADING CORP.

Forty-Fourth: Plaintiffs repeat and reiterate each and every allegation contained in paragraphs "First" through "Twentieth", "Twenty-Third", "Twenty-Fourth", "Twenty-Fifth", "Thirtieth" through "Thirty-Third" and "Fortieth", as if fully set forth herein.

Forty-Fifth: Members held accounts through which Short Sellers executed one or more transactions in the Contract.

Forty-Sixth: Members, with knowledge of intent of Short Sellers to deflate the prices of the Contract acquiesced and/or participated in the acts of Short Sellers.

Forty-Seventh: As a result of the manipulative acts and omissions of the Members in violation of the Commodity Act and § 1 of the Sherman Act, the plaintiffs and members of the class have been damaged in an amount yet to be determined but believed to be in the many millions of dollars.

COUNT VI

As and for a First Claim for Relief Against the New York Mercantile Exchange

Forty-Eighth: Plaintiffs repeat and reiterate each and every allegation contained in paragraphs "First" through "Twentieth", "Twenty-Third", "Twenty-Fourth", "Twenty-Fifth" and "Thirtieth", as if fully set forth herein.

Forty-Ninth: Between April 14, 1976 and May 7, 1976, the CFTC had its personnel on the floor of the Exchange and brought to the attention of the Exchange's officers, the large short position of the Short Sellers and Members in the Contract. Moreover, on or about May 5, 1976, the CFTC sent mail-o-grams to the Exchange in which it noted that traders had amassed sizeable obligations to deliver Maine potatoes from the 1975 crop. The mail-o-grams also stated that the Short Sellers were "required by law to avoid causing artificial prices in either cash or futures market".

Fiftieth: Despite the aforesaid warnings by personnel of the CFTC, officers of the Exchange assured the CFTC that the short positions would be covered notwithstanding the fact that the Exchange had taken no steps to resolve the problem and had no basis for so advising the CFTC.

Fifty-First: Contrary to and in violation of the Commodity Act, the Rules and Regulations of the CFTC, and its own By-Laws, Rules and Regulations, the Exchange:

(a) Failed and neglected to report and concealed violations of the Commodity Act, the Rules and Regulations of

the CFTC and its own By-Laws, Rules and Regulations by the Short Sellers and Members.

(b) Failed and neglected to direct that liquidating orders of the Contract be entered on or before May 7, 1976 with respect to accounts of Members which Exchange knew or should have known would default if not liquidated.

(c) Failed and neglected to perform its duties as a contract market with respect to the Contract.

(d) Failed and neglected to exercise due care to halt manipulative practices with respect to the Contract.

Fifty-Second: As a result of the acts and omissions of Exchange, the price of the Contract was artificially lowered during the period of at least April 13, 1976 through May 7, 1976.

Fifty-Third: In closing out or offsetting their open long positions at the artificially low price caused by the acts and omissions of defendant Exchange, plaintiffs and the members of the class have been damaged in an amount as yet undetermined but believed to be in the many millions of dollars.

WHEREFORE, plaintiffs, individually and on behalf of the class, demand judgment against the defendants as follows:

(a) On Counts I, II, IV, and VI in an amount equal to the damages which have been sustained by the class; and

(b) On Counts III and V in an amount equal to treble the damages which have been sustained by the class; and

(c) All together with interest, costs and disbursements of the action, and the reasonable attorneys' fees incurred in the prosecution of the action.

Dated:

Yours, etc.,

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By: .....
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[Affidavit of service omitted]

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2375 (LFM), 76 Civ. 2554 (LFM),
76 Civ. 2571 (LFM), 76 Civ. 2594 (LFM)

NATIONAL SUPER SPUDS, INC. et al.,

Plaintiffs,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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76 Civ. 2648 (LFM)

INCOMCO,

Plaintiff,

—against

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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76 Civ. 3210 (LFM)

HOWARD BERENSON,

Plaintiff.

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

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76 Civ. 4350 (LFM)

NEIL LEIST et al.,

Plaintiffs,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

---

76 Civ. 5200 (LFM)

DEXTER RICHARDS,

Plaintiff,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

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MacMahon, *District Judge.*

Defendants, the New York Mercantile Exchange (the "Exchange"), Richard Levine ("Levine"), Howard Gabler ("Gabler"), Alfred Pennisi ("Pennisi"), Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson"), move under Rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, or, in the alternative, under Rule 56(b), Fed.R.Civ.P., for partial summary judgment dismissing all or part of the complaints against them in these related actions.[1] Since

[1] The Exchange moves in the following actions: *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571, 76 Civ. 2594 (the "consolidated class ac-

all parties have submitted factual material outside the pleadings, we treat the motions as motions for partial summary judgment.

These actions arise out of the much publicized default in May 1976 of Maine potato futures contracts,[2] when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country. The primary claim in these actions is that the default was caused by certain defendants' price manipulation.

In order to understand these motions, a basic understanding of the commodities futures industry is essential. A commodity future is a contract for the future delivery of a certain commodity. Except for price, all the terms of the contracts for a given commodity traded on an exchange are standardized and, thus, the contracts are fungible. The actual trading of futures is done by futures commission merchants and floor brokers, both of whom must be registered with the Commodities Futures Trading Commission

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tions"); *Incomco* v. *New York Mercantile Exchange*, 76 Civ. 2648; and *Leist* v. *Simplot*, 76 Civ. 4350.

Levine, Gabler and Pennisi move in *Leist* v. *Simplot*, 76 Civ. 4350.

Clayton moves in the consolidated class actions and in *Leist* v. *Simplot*, 76 Civ. 4350.

Heinold and Thomson move in the consolidated class actions, in *Berenson* v. *Simplot*, 76 Civ. 3210, and in *Leist* v. *Simplot*, 76 Civ. 4350.

The motions of the Exchange, Levine, Clayton, Heinold and Thomson in *Richards* v. *New York Mercantile Exchange*, 76 Civ. 5200, are denied as moot because this action was discontinued after these motions were filed.

The motions of the Exchange and Clayton in *Berenson* v. *Simplot*, 76 Civ. 3210, are also denied as moot because this action has been discontinued as to the Exchange and Clayton.

[2] See N.Y. Times, May 26, 1976, at 1, col. 1.

(the "CFTC").[3] Additionally, trading may take place only on exchanges which have complied with certain statutory requirements and have been designed as "contract markets" by the CFTC.[4]

A seller of a futures contract is, in the language of the trade, in a "short" position, that is, he is obligated to deliver the commodity at a future date in return for the right to receive the purchase price. Conversely, a buyer of a futures contract is said to be in a "long" position, that is, he is obligated to pay the purchase price in return for the right to receive the commodity. As a practical matter, however, physical delivery of the commodity is made on only a small fraction of the futures contracts traded on the nation's exchanges. Most of the trades are made by speculators who have no intention of delivering or receiving the actual commodity. As the last day of trading in a particular contract approaches, a speculator in a short position (a seller) will cover his obligation to deliver by buying a contract. Similarly, a speculator in a long position (a buyer) will cover his obligation to pay by selling a contract.[5]

Plaintiffs, traders and a dealer in potatoes, were buyers holding long positions in May 1976 Maine potato futures contracts. They allege that Clayton, Heinold and Thomson, futures commission merchants, conspired with certain of their customers to manipulate and depress the price of the May contract by selling an illegally large number of May contracts, thereby causing plaintiffs to sell their contracts and potatoes at an artificially depressed price.

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[3] 7 U.S.C. §§ 6d, 6e, 6f.

[4] 7 U.S.C. §§ 6, 7.

[5] The commodities futures industry is described in more detail in S. Angrist, Sensible Speculating in Commodities (1972) and S. Kroll & I. Shishko, Commodity Futures Market Guide (1973).

Plaintiffs contend that the actions of Clayton, Heinold and Thomson violated the Commodities Exchange Act[6] (the "Act"), various regulations promulgated thereunder,[7] and Sections 1 and 2 of the Sherman Act.[8] Plaintiffs also contend that the Exchange, a designated contract market, and its officers, Levine, Gabler and Pennisi, are liable to them for failure to take steps to prevent the downward price manipulation by the other defendants, and that the Exchange conspired with the other defendants to manipulate the price.

Specifically, plaintiffs allege that the Exchange and its officers failed to report and concealed violations of the Act and the regulations promulgated thereunder; that the Exchange and its officers violated the Act by failing to enforce its own rules, the Act and the CFTC's regulations; and that the Exchange violated Sections 1 and 2 of the Sherman Act.

Implied Right of Action

All moving defendants contend that they are entitled to partial summary judgment because there is no private right of action against them under the Act. Concededly, such a right of action existed prior to 1974,[9] but, in that

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[6] 7 U.S.C. § 1 et seq.

[7] Plaintiffs also allege violations of the Exchange's rules. Because the obligation to obey these rules arises under the CFTC's regulations, we consider these claims as alleging violations of the CFTC's regulations.

[8] 15 U.S.C. §§ 1, 2.

[9] *E.g., Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

year, the Act was amended extensively,[10] and the question before us is whether the private right of action has survived the 1974 amendments to the Act.

Although a number of other district courts have considered this question, there is no clear consensus on the answer.[11] This difference of opinion and the importance of the question to the future course of these actions compel us to resolve the question ourselves.

Under *Cort* v. *Ash*,[12] four factors are relevant in determining whether a private right of action may be implied under a federal statute which does not expressly provide for one:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is,

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[10] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (codified at 7 U.S.C. § 1 et seq.). The Act was further amended in 1978. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (codified at 7 U.S.C. § 1 et seq.).

[11] Nine cases have stated that a private right of action exists under the Act: *R.J. Hereley & Son* v. *Stotler & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,773 (N.D. Ill. 1979); *Smith* v. *Grover*, No. 77 C 2297 (N.D. Ill. Feb. 2, 1979); *Gravois* v. *Fairchild, Arabatzis & Smith, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 20,706 (E.D. La. 1978); *Berenson* v. *Madda Trading Co.*, No. 78-544 (D.D.C. Oct. 30, 1978); *Hoffmayer* v. *Dean Witter & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,694 (N.D. Cal. 1978); *Kelley* v. *Carr*, 442 F. Supp. 346 (W.D. Mich. 1977); *Bache Halsey Stuart, Inc.* v. *French*, 425 F. Supp. 1231 (D.D.C. 1977); *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976); *Milani* v. *Conticommodity Serv., Inc.*, 462 F. Supp. 405 (N.D. Cal. 1976).

Five cases have stated that no private right of action exists under the Act: *Alkan* v. *Rosenthal & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 20,797 (S.D. Ohio 1979); *Berman* v. *Bache Halsey Stuart, Shields, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 20,796 (S.D. Ohio 1979); *Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (D. Ohio 1976); *Arkoosh* v. *Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976), *aff'd on other grounds*, 571 F.2d 437 (8th Cir. 1978).

[12] 422 U.S. 66 (1975).

> does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? . . ." [13]

There can be no question that plaintiffs, investors in the commodities market and a dealer in potatoes, are within the class "for whose especial benefit the statute was enacted." As Senator Dole stated, the primary purposes of the 1974 amendments to the Act were "[to protect] against manipulation of markets and to protect any individual who desires to participate in futures market trading." [14] Additionally, the Act itself states that price manipulation and unreasonable fluctuations in price "are detrimental to . . . persons handling the commodities." [15]

Thus, we find that the first element of the *Cort* test is satisfied.

The second element of the *Cort* test, congressional intent, is more troublesome. The 1974 amendments to the Act established an administrative procedure under which "[a]ny person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to

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[13] *Id.* at 78 (citations omitted).

[14] 120 Cong. Rec.-Senate 30466 (1974) (remarks of Sen. Dole); accord 120 Cong. Rec.-Senate 34998-99 (1974) (remarks of Sen. Clark). See also *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977).

[15] 7 U.S.C. § 5.

be registered under . . . this title may"[16] commence an administrative proceeding before the CFTC to recover reparations. Judgments resulting from these reparation proceedings are subject to judicial review by the courts of appeal[17] and may be enforced in the district courts.[18]

The 1974 amendments also give the CFTC plenary power over futures commission merchants and contract markets. The CFTC may suspend or revoke the registration of a futures commission merchant or the designation of a contract market.[19] The CFTC is also authorized to issue cease and desist orders against contract markets[20] and to assess civil penalties of up to $100,000 against futures commission merchants and contract markets.[21] Finally, the CFTC or the Attorney General, at the request of the CFTC, is authorized to bring an action in the district courts against futures commission merchants and contract markets for a restraining order, an injunction or a writ of mandamus to compel compliance with the Act and the regulations thereunder.[22]

We believe that under the maxim of "*expressio unius est exclusio alterius*,"[23] the establishment of administrative

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[16] 7 U.S.C. § 18(a).

[17] 7 U.S.C. § 18(g).

[18] 7 U.S.C. § 18(f).

[19] 7 U.S.C. §§ 7b, 9.

[20] 7 U.S.C. § 13a.

[21] 7 U.S.C. §§ 9, 13a.

[22] 7 U.S.C. § 13a-1. The 1978 amendments to the Act added a provision by which a state may bring an action under the Act on behalf of its citizens. 7 U.S.C. § 13a-2.

[23] Expression of one thing is the exclusion of another. See *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Redington* v. *Touche Ross & Co.*, 592 F.2d 617, 629-30 (2d Cir.) (Mulligan, J., dissenting), *cert. granted*, 47 U.S.L.W. 3368 (U.S. Nov. 27, 1978) (No. 78-309).

reparation proceedings and the plenary grant of disciplinary and regulatory power to the CFTC evidences a congressional intent to deny a private right of action under the Act. This conclusion is reinforced by the fact that Congress was informed of the need for a private right of action under the Act[24] but rejected a bill which would have expressly established such a right of action.[25]

Thus, we conclude that Congress did not intend that there be a private right of action under the Act.

The third element of the *Cort* test, whether the implication of a private right of action would be consistent with the underlying purposes of the Act, also weighs against the implication of such a right. As applied by the Supreme Court, this element of the *Cort* test is satisfied when the implication of a private right of action is necessary in order to further the purposes of the statute in question.[26]

Contract markets, such as the Exchange, are not registered persons under the Act, and, thus, they are exempt from the administrative reparation proceeding established by the Act. The CFTC alone has the right to assess a monetary civil penalty against a contract market, and the Act imposes two limitations on the amount of the civil penalty which may be assessed against a contract market. First, there is an overall limitation of $100,000.[27] Second,

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[24] Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 3, 737, 746 (1974) (testimony of Prof. Roy A. Schotland).

[25] S. 2837, 93d Cong., 1st Sess. § 505(a) (1973). This bill provided for actual damages for non-wilful violations of the Act and treble damages for wilful violations.

[26] *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 39-40 (1977); *Cort* v. *Ash, supra*, 422 U.S. at 84; *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964); Comment, Implying Private Causes of Action from Federal Statutes, 17 Boston Col. Indus. & Com. L. Rev. 53, 69 (1975).

[27] 7 U.S.C. § 13a.

the CFTC is required to consider "whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties." [28] We believe that both of these limitations evidence a congressional intent to limit the potential monetary exposure of contract markets. Since neither of these limitations would be present in private actions against contract markets, the implication of a right of action against contract markets would be inconsistent with the manifest intent of Congress to limit the potential monetary liability of contract markets.

Additionally, the implication of a private right of action against futures commission merchants would not be consistent with the Act because it is not necessary to further the purposes of the Act. Since there is no dispute that futures commission merchants, such as Clayton, Heinold and Thomson, are subject to the administrative reparation proceedings mentioned above,[29] there is plainly no necessity to imply a right of action to remedy injuries which are fully compensable in administrative proceedings.

Thus, we conclude that implication of a private right of action under the Act would not be consistent with the underlying purposes of the Act.

The fourth element of the *Cort* test, whether the implication of a private right would infringe on an area of state concern, favors the implication of such a right since it is well settled that the regulation of commodity futures trading is essentially a matter of federal concern.[30]

Thus, our application of the *Cort* test leads us to conclude that there is no private right of action under the

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[28] *Id.*

[29] See text accompanying notes 16-18, *supra*.

[30] See *e.g. Smith* v. *Grover*, *supra*, slip op. at 18-19; *Gravois* v. *Fairchild, Arabatzis & Smith, Inc.*, *supra*, Comm. Fut. L. Rep. (CCH) ¶ 20,706 at 22,873.

Act because the two critical elements of the test,[31] congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right.

Plaintiffs contend that the implication of a private right of action under the Act is compelled by those cases which have implied private rights of action under the Securities Exchange Act of 1934.[32] Although we agree with plaintiffs that there are some similarities between the commodity futures industry and the securities industry, we find that the respective statutory schemes are significantly different. First, the Securities Exchange Act does not provide any administrative remedy to defrauded investors as does the Commodities Exchange Act. Second, the Securities Exchange Act does not grant the SEC the same plenary powers that the Commodities Exchange Act gives the CFTC.[33] Finally, the Commodities Exchange Act contains no counterpart to the Securities Exchange Act's specific grant of jurisdiction to the district courts over violations of that Act,[34] which the Supreme Court found of

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[31] See *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers, supra,* 414 U.S. at 457-58.

[32] 15 U.S.C. § 78a et seq.

[33] The SEC's power over brokers, dealers and securities exchanges is limited to suspension or revocation of their registration. 15 U.S.C. §§ 78o(b)(4), 78s(h). The SEC may also seek to enjoin brokers, dealers and securities exchanges from violating the Security Exchange Act. 15 U.S.C. § 78u.

[34] 15 U.S.C. § 78aa provides, in pertinent part, that:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

Although 7 U.S.C. § 13a-2(2) closely resembles the language quoted above, its reach is expressly limited to actions brought by state attorneys general.

critical importance when it implied private rights of action under that Act.[35]

Plaintiffs also argue that the CFTC interprets the Act as allowing private rights of action[36] and that the CFTC's interpretation is entitled to "'great deference.'" [37] However, as the Supreme Court has recently stated, the administrative deference rule is not applicable where the "narrow legal issue is one particularly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants." [38]

Finally, we note that the Supreme Court's recent decision in *Cannon* v. *University of Chicago*[39] is readily distinguishable from this case. In *Cannon*, the Supreme Court implied a private right of action for a victim of alleged sex discrimination under Title IX of the Education Amendments of 1972,[40] despite the existence of an administrative procedure to enforce those amendments. However, the only administrative remedy under Title IX is the termination of federal grants to educational institutions which discriminate on the basis of sex. Thus, the Supreme Court found that Title IX provided no private administrative remedy to victims of sex discrimination.[41] In contrast,

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[35] *Securities Investor Protection Corp.* v. *Barbour*, *supra*, 421 U.S. at 424; *J.I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 430-31.

[36] Amicus Curiae Brief of the Commodities Futures Trading Commission submitted in *Smith* v. *Grover*, *supra*.

[37] *United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977) (citations omitted).

[38] *Piper* v. *Chris-Craft Indus., Inc.*, *supra*, 430 U.S. at 41 n.27.

[39] 47 U.S.L.W. 4549 (U.S. May 14, 1979) (No. 77-926).

[40] 20 U.S.C. §§ 1681-1686.

[41] See 47 U.S.L.W. at 4556.

the reparations procedure available under the Commodities Exchange Act provides a remedy directly for the benefit of private parties injured by violations. Thus, unlike *Cannon,* the implication of a right of action here is not necessary to provide a plenary remedy to the intended beneficiaries of the Act.

Cannon is also distinguishable for a second reason. In *Cannon,* the Supreme Court noted that Title IX was enacted in 1972 when the Court had been rather liberal in finding implied rights of action. The Court found that Congress expected Title IX to be interpreted in accordance with that liberal view.[42] The Commodities Exchange Act, on the other hand, was reconsidered by Congress as recently as last year when the Supreme Court had retreated from its liberal view toward implied rights of action.[43] Yet, in enacting the 1978 amendments to the Act, Congress again failed to add a section expressly providing for a private right of action despite knowledge that a number of district courts had held that the private right of action previously implied did not survive the 1974 amendments.[44] *Cannon* teaches that the failure of Congress to provide for a private right of action must be viewed in light of the judicial attitude toward such rights at the time of enactment. In light of that teaching, the failure of Congress to provide for a private right of action in the 1978 amendments evidences an intent to deny such a right.

Thus, we conclude that there is no private right of action against futures commission merchants and contract markets under the Act. Since there is no private right of action under the Act, it necessarily follows that there is no private

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[42] *Id.* at 4554.

[43] *Id.*

[44] 124 Cong. Rec.-Senate 10537 (remarks of Sen. Huddleston).

right of action under the regulations promulgated pursuant to the Act.[45]

ANTITRUST CLAIMS

Clayton and Heinold also move for summary judgment on the antitrust claims, asserting that there is no genuine issue of fact that they did not intend to manipulate the price of May 1976 Maine potato futures contracts.

A party seeking summary judgment bears the burden of demonstrating the absence of any genuine issue of fact,[46] even when the motion is unopposed.[47] Clayton and Heinold have submitted excerpts of deposition testimony given by certain of their employees. Although this testimony does tend to show that Clayton and Heinold lacked the intent required for a violation of the Sherman Act, it is neither conclusive nor sufficiently clear to allow us to conclude that there is no genuine issue of fact. Clayton's employee, Delbridge, admitted that Clayton took no steps to investigate its clients' ability to deliver despite their large short position, and Heinold's vice-president, Klopfenstein, admitted that Heinold did not take the steps that it normally would have taken to ensure that its short customers could deliver. Given the elusive nature of intent and its significance to an antitrust violation,[48] we cannot say that there is no issue of fact regarding Clayton's and Heinold's knowledge and intent.[49]

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[45] *Crane Co.* v. *American Standard, Inc.*, No. 77-7517, slip op. at 2019 n.11 (2d Cir. Apr. 4, 1979).

[46] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

[47] *Id.* at 160.

[48] See *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978).

[49] See *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) ("[S]ummary judgment is likely to be inappropriate when the issues concern intent.").

Accordingly:

1. There being no just reason for delay, the Clerk of the court is directed, pursuant to Rule 54(b), Fed.R.Civ.P., to enter final judgment:

A. In favor of the Exchange on its motions for partial summary judgment on the sixth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; the first and fourth claims of the complaint in *Incomco* v. *New York Mercantile Exchange*, 76 Civ. 2648; and the fourth claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

B. In favor of Levine, Gabler and Pennisi on their motion for summary judgment on the fourth claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

C. In favor of Clayton on its motions for partial summary judgment on the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; and the first claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

D. In favor of Heinold and Thomson on their motions for partial summary judgment on the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; the first claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350; and the second claim of the complaint in *Berenson* v. *Simplot*, 76 Civ. 3210, to the extent that it asserts a claim under the Act.

2. Clayton's and Heinold's motions for summary judgment in their favor on all other claims against them are denied in all respects.

So ordered.

Dated: New York, N.Y.
May 29, 1979

/s/ LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2375 (LFM)
76 Civ. 2554 (LFM)
76 Civ. 2571 (LFM)
76 Civ. 2594 (LFM)

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs,

—against—

NEW YORK MERCANTILE EXCHANGE; CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.; HEINOLD COMMODITIES, INC.; THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.; PRESSNER TRADING CORP.; JACK RICHARD SIMPLOT; J.R. SIMPLOT; J.R. SIMPLOT CO.; SIMPLOT INDUSTRIES, INC.; PETER J. TAGGARES; P.J. TAGGARES CO.; C.L. OTTER; SIMTAG FARMS; KENNETH RAMM; A & B FARMS, INC.; HUGH V. GLENN; GEARHEART FARMING, INC. and ED MCKAY,

Defendants.

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76 Civ. 2648 (LFM)

INCOMCO,

Plaintiff,

—vs.—

NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO., and HAROLD COLLINS,

Defendants.

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76 Civ. 4350 (LFM)

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs,

—against—

JOHN RICHARD SIMPLOT, J. R. SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, P. J. TAGGARES & CO., HENRY A. POLLAK, HARVEY B. POLLAK, HARVEY B. POLLAK COMPANY, GERALD RAFFERTY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLIGHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, ROBERT EDELSTEIN, MURIEL EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, ROBERT REARDON, F. J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER, HORNBLOWER, WEEKS-HEMPHILL, NOYES, CLAYTON BROKERAGE CO., INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B

FARMING INC., HUGH GLENN, GEARHEART FARMING, INC., EDWARD MCKAY, NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI, "JOHN" HUMPHREYS, FRANK FULLMER,

Defendants.

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76 Civ. 3210 (LFM)

HOWARD BERENSON,

Plaintiff,

—against—

JACK RICHARD SIMPLOT; J.R. SIMPLOT CO.; SIMPLOT INDUSTRIES, INC.; SIMTAG FARMS; PETER J. TAGGARES; P.J. TAGGARES COMPANY; THE NEW YORK MERCANTILE EXCHANGE; THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.; HEINOLD COMMODITIES, INC.; CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.; PRESSNER TRADING CORP.,

Defendants.

Defendants, the New York Mercantile Exchange (the "Exchange"), Richard Levine ("Levine"), Howard Gabler ("Gabler"), Alfred Pennisi ("Pennisi"), Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold") and Thompson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thompson"), having moved under Rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, or, in the alternative, under Rule 56(b), Fed.R.Civ.P., for partial summary judgment, and an Opinion and Decision dated May 29, 1979 having been duly rendered, and the Court having expressly determined that there is no just

reason for delay and having expressly directed the Clerk of the Court to enter final judgment pursuant to Rule 54(b) Fed.R.Civ.P., it is hereby

ADJUDGED that the sixth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571, and 76 Civ. 2594 is dismissed as to the Exchange; and it is further

ADJUDGED that the first and fourth claims of the complaint in *Incomco* v. *New York Mercantile Exchange*, 76 Civ. 2648 are dismissed as to the Exchange; and it is further

ADJUDGED that the fourth claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350 is dismissed as to the Exchange; and it is further

ADJUDGED that the fourth claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350 is dismissed as to Levine, Gabler, and Pennisi; and it is further

ADJUDGED that the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; and the first claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350 are dismissed as to Clayton; and it is further

ADJUDGED that the fourth claim of the first amended consolidated class action complaint in *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 and 76 Civ. 2594; the first claim of the complaint in *Leist* v. *Simplot*, 76 Civ. 4350; and the second claim of the complaint in *Berenson* v. *Simplot*, 76 Civ. 3210,

to the extent that it asserts a claim under the Commodity Exchange Act, are dismissed as to Heinold and Thompson.

Dated: New York, New York
July 3, 1979

LLOYD F. MCMAHON
U.S.D.J.

JUDGMENT ENTERED: 7/6/79

RAYMOND F. BURGHARDT
Clerk

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 402, 403, 404—September Term, 1979

(Argued January 16, 1980 Decided July 8, 1980)

Docket Nos. 79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, P. J. TAGGARES & CO., HENRY A. POLLACK, HARVEY B. POLLACK, HARVEY B. POLLACK COMPANY, GERALD RAFFERTY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLIGHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, ROBERT EDELSTEIN, MURIAL EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, ROBERT REARDON, F.J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER, HORNBLOWER & WEEKS-HEMPHILL, NOYES INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING INC., HUGH GLENN, GEARHEART FARMING, INC., EDWARD MCKAY, "JOHN" HUMPHREYS, FRANK FULLMER,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

INCOMCO,

Plaintiff-Appellant,

—v.—

WAYNE COUNTY PRODUCE CO., and HAROLD COLLINS,

Defendants,

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. CHINER, EUGENE P. WEISMEN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—v.—

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., PRESSNER TRADING CORP.,

JACK RICHARD SIMPLOT, J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., PETER J. TAGGARES, P.J. TAGGARES CO., C.L. OTTER, SIMTAG FARMS, KENNETH RAMM, A & B FARMS, INC., HUGH V. GLENN, GEARHEART FARMING, INC. and ED MCKAY,

Defendants,

HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

Before:

FRIENDLY, MANSFIELD and KEARSE,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, 470 F.Supp. 1256 (1979), granting partial summary judgment to the New York Mercantile Exchange and three futures commission merchants, defendants in three consolidated actions wherein plaintiffs claimed damages arising out of the default by sellers of the May 1976 Maine potato futures contracts, on the ground that there is no private cause of action for damages under the Commodity Exchange Act, 7 U.S.C. §§ 1-19.

Reversed.

LEONARD TOBOROFF, Esq., New York, N.Y. (Robson & Toboroff, New York, N.Y.), *for Plaintiffs-Appellants Neil Leist, Philip Smith and Incomco.*

POMERANTZ, LEVY, HAUDEK & BLOCK, New York, N.Y. and
HOLLINSHEAD and MENDELSON, Pittsburgh, Pa., *for Class Plaintiffs-Appellants.*

WILLIAM E. HEGARTY, Esq., New York, N.Y. (Cahill Gordon & Reindel, New York, N.Y., Charles Platto, Esq. and Peter Leight, Esq., Of Counsel) and
REIN, MOUND & COTTON, New York, N.Y. (Maurice Mound, Esq., Of Counsel), *for Defendants-Appellees New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi.*

LAWRENCE H. HUNT, Esq., Chicago, Ill. (Sidley & Austin, Chicago, Ill.) and
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, New York, N.Y. *for Defendant-Appellee Heinold Commodities, Inc.*

W. STANLEY WALCH, Esq., St. Louis, Missouri (Thompson & Mitchell, St. Louis, Missouri, Gerard K. Sandweg, Esq. and Kenton E. Knickmeyer, Esq., Of Counsel) *for Defendant-Appellee Clayton Brokerage Co. of St. Louis, Inc.*

HALL, MCNICHOL, HAMILTON, CLARK & MURRAY, New York, N.Y. *for Defendant-Appellee Thomson McKinnon Auchincloss Kohlmeyer Inc.*

MARK D. YOUNG, Esq., Washington, D.C. (John G. Gaine, General Counsel, Pat G. Nicolette, Deputy General Counsel, and Gregory C. Glynn, Associate General Counsel, Washington, D.C., Of Counsel), *for Amicus Curiae Commodity Futures Trading Commission.*

FRIENDLY, Circuit Judge:

Plaintiffs in three consolidated actions in the District Court for the Southern District of New York appeal from an order of Judge, now Chief Judge, MacMahon, 470 F.Supp. 1256 (1979), granting appellees' motions for partial summary judgment. The court struck from the complaints all claims based on the Commodity Exchange Act, (CEA), 7 U.S.C. §§ 1-19, as amended in 1974, as distinguished from other claims under the antitrust laws. The actions were to recover damages allegedly suffered by the plaintiffs as a result of what Judge MacMahon characterized as

> the much publicized default in May 1976 of Maine potato futures contracts, when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country. 470 F.Supp. at 1258 (footnote omitted).

The basis for the court's order was that no private cause of action exists for breach of the CEA. Since this important issue has divided the district courts, including those within our circuit, we feel constrained

to discuss it in some detail.[1] We think it desirable, as did the district court, to begin with an explanation of the nature of the commodity futures markets.

I. COMMODITY FUTURES MARKETS

A commodity futures contract is simply a bilateral executory agreement for the purchase and sale of a particular commodity. The seller of the contract commits himself to deliver the commodity at a fixed date in the future, while the buyer commits himself then to accept delivery and pay the agreed price. 1 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 4.6 (421)(1979); H. R. Rep. No. 93-975, 93d Cong., 2d Sess. 130 (1974). Every aspect of the futures contract is standardized except price. For example, the contract involved in this case, the May 1976 Maine potato futures contract, is for 50,000 pounds of Maine grown potatoes of a specified quality to be delivered at specified points in cars of the Bangor & Aroostook Railroad, between May 7 and May 25, 1976. Since price is the only variable, negotiations can readily proceed and the agreed prices can be speedily disseminated to

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1 The length of our treatment, particularly the explanation of the nature of the Commodities Futures Market in Part I and the history of congressional regulation in Part III, is also partly due to the fact that when the case was argued and for some time after the majority opinion was prepared, no court of appeals had passed on the question and we anticipated being the first to do so. However, in a case decided May 12, 1980, a divided panel of the Court of Appeals for the Sixth Circuit reached the issue *sua sponte* and, in an excellent and succinct opinion, held, as we do, on largely the same reasoning, that there is an implied private right of action under the CEA. *Curran* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (May 12, 1980). Although, as argued in the dissent, *Curran* involved a suit by a customer against a broker, the court did not limit its reasoning to that situation.

other traders. Standardization also makes the contracts fungible. Original sellers and buyers can therefore offset their positions by acquiring opposite contracts, either paying or gaining any price differential. H. R. Rep. No. 93-975, *supra*, at 130.

The person who has sold a futures contract, i.e., someone committed to deliver the commodity in the future, is said to be in a "short" position. Conversely, someone committed to accept delivery is "long". It is a rare case, however, in which actual delivery takes place pursuant to a futures contract.[2] Save in these rare instances, the short and the long must liquidate their positions prior to the close of trading in the particular futures contract. Although the means by which this is done is routinely referred to as futures trading, futures contracts are not "traded" in the normal sense of that word. Rather they are formed and discharged. Clark, *Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 Emory L. J. 1175, 1176 (1978). A person seeking to liquidate his futures position must

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2 See H. R. Rep. No. 93-975, *supra*, at 129 (less than 3% of all futures contracts culminate in delivery); T. Hieronymus, Economics of Futures Trading 41 (1977) (less than 1%). Neither the speculative investor nor the person using the futures market as a hedge for his position in the market for the actual commodity generally desires delivery. H. R. Rep. N. 93-975, *supra*, at 129. See *Volhart Brothers, Inc.* v. *Freeman*, 311 F.2d 52, 55-56 (5 Cir. 1962); Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges* 73 Yale L. J. 171, 173 (1963).

In occasional instances, however, people do use futures trading as an alternative market for the physical commodity. H. R. Rep. No. 93-975, *supra*, at 132. Delivery is made through the clearing house by transfer of warehouse receipts or rights to loaded freight cars and then transported according to the purchaser's instructions. See *Cargill, Inc.* v. *Hardin*, 452 F.2d 1154, 1157 (8 Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

form an opposite contract for the same quantity, so that his obligations under the two contracts will offset each other. Thus, a short who does not intend to deliver the commodity must purchase an equal number of long contracts; a long must sell an equal number of short contracts. Money is made or lost in the price differential between the original contract and the offsetting transaction. If the price of the future has declined, usually because of market information indicating a drop in the price of the commodity, the short will realize a profit; if the futures price has risen, the long will realize a profit. See *Cargill, Inc.* v. *Hardin*, 452 F.2d 1154, 1157 (8 Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). Futures trading is a zero-sum game. Since money is made from the change in futures contract prices, and every contract has a long and a short, every gain can be matched with a corresponding loss. See Melamed, *The Mechanics of a Commodity Futures Exchange: A Critique of Automation of the Transaction Process*, 6 Hofstra L. Rev. 149, 166 & n.39 (1977).

The mechanics of the commodity futures market, and the roles of the various participants, can be illustrated by tracing a typical transaction. An individual wishing to invest in the futures market approaches a "futures commission merchant" (FCM). FCM's are defined in the Commodity Exchange Act as individuals or associations "engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery . . . on . . . any contract market . . . ," § 2(a)(1), 7 U.S.C. § 2, and they are registered with the Commodity Futures Trading Commission (CFTC). The FCM will demand a "margin" payment from the customer, which is simply a security deposit designed to protect against adverse price movements. The amount of the margin is

based upon the amount which the customer can lose in a day or two; when the margin is exhausted the FCM will call the customer for additional payment. The margin is generally only a small percentage of the value of the contract. See Melamed, *supra*, 6 Hofstra L. Rev. at 167 & n.41. FCM's are paid a commission on their customer's business.

The FCM relays its customer's order to one of its "floor brokers" trading on the exchange. The broker stands on the outside of a "pit" or "ring" around which are gathered other persons trading in the same contract. Some of the traders are brokers acting on behalf of customers, while others trade on their own account. Contracts are made by "open outcry". The broker with an order will indicate his position at the pit by shouting and gesticulating with standardized hand signals. Someone willing to enter the contract responds across the pit in similar fashion, and the deal is made. Observers on raised pulpits alongside the pit record the transaction and feed the information into a communications system, publicizing it to other traders who, in any event, had an opportunity to witness the transaction in the pit. The broker relays the particulars of the deal to the FCM, who informs the customer.

When two traders have reached an agreement on the floor of the exchange, the role of the clearinghouse comes into play. The clearinghouse, a key link in the futures trading system, operates as the seller to all buyers and the buyer from all sellers, thus facilitating the interchangeability of the contracts and the cancelling of positions. H. R. Rep. No. 93-975, *supra*, at 149; S. Rep. No. 93-1131, 93d Cong., 2d Sess. 17 (1974); *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1156. Not all FCM's are clearinghouse members; those that are not

must deal through one that is. The clearinghouse treats FCM's as principals in trading transactions and demands margin payments from them. The clearinghouse requires FCM's to "mark to the market" at the close of every trading day. Any net gain or loss which the FCM has sustained in the course of the day's trading is computed and margin adjustments are made accordingly. Melamed, *supra*, 6 Hofstra L. Rev. at 167-68.

Generally speaking there are two classes of traders in commodity futures contracts, although, as some of the facts of the instant cases indicate, the distinctions between them are often quite blurred. A "hedger" is a trader with an interest in the cash market for the commodity, who deals in futures contracts as a means of transferring risks he faces in the cash market. See H. R. Rep. No. 93-975, *supra*, at 131, 133, 162. See also the complicated definition of "bona fide hedging transactions and positions" promulgated by the CFTC, 17 C.F.R. § 1.3(z). The owner of a commodity can hedge against declining prices by entering into equivalent short futures contracts for the month when he expects to be able to sell, and a processor (e.g., a miller) can hedge against increasing prices by going long for the month when he will need the commodity. Losses caused by a decline in prices on the cash market in the former case or an advance in the latter will be offset by profits in the futures transactions. See generally H. R. Rep. No. 93-975, *supra*, at 130-34; *Cargill, Inc.* v. *Hardin*, *supra*, 452 F.2d at 1157-58; Note, *supra*, 73 Yale L. J. at 171-73. The benefits of hedging extend beyond the immediate participants in the transactions. "Because hedging of price risks in a futures market enables a merchant to reduce the exposures he has in doing

business, he is able to operate on a lower profit margin with consequent lower prices to the consumer." H. R. Rep. No. 93-975, *supra*, at 132-33; see also S. Rep. No. 93-1131, *supra*, at 18; Valdez, *Modernizing the Regulation of the Commodity Futures Markets*, 13 Harv. J. Legis. 35, 40 (1975).

The system would not function, however, if only hedgers sold and purchased commodity futures contracts.[3] While hedging performs an insurance function, it is actually quite different from insurance. The risks faced by those dealing in the "cash" market, the market for the actual commodity, are not spread among those similarly situated, as with insurance, but rather are shifted to others. Bianco, *The Mechanics of Futures Trading: Speculation and Manipulation*, 6 Hofstra L. Rev. 27, 32 (1977); *Cargill, Inc.* v. *Hardin, supra*, 452 F.2d at 1158. The speculative investor, with no underlying interest in the cash market, is essential to take on the risks which the hedgers want to shift. The critical role of the "speculator" was described at some length in the House Report on the 1974 amendments:

> The principal role of the speculator in the markets is to take the risks that the hedger is unwilling to accept. The opportunity for profit makes the speculator willing to take those risks. The activity of speculators is essential to the operation of a futures market in that the composite bids and

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3 Johnston, *Understanding the Dynamics of Commodity Trading*, 35 Bus. Law. 705, 709 (1980), states that "[a]s a general rule, for a market to be broad enough to be efficient and to accomodate the extremely large orders that come in from time to time from dealers and commercial firms, 50 to 75 percent of the open interest and volume of trading must come from speculators—this is essential for there to be a viable market."

> offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match. H. R. Rep. No. 93-975, *supra*, at 138.

As commentators have noted, "Congress itself has recognized that the investor—although he is commonly referred to as a speculator in this context—is what makes the commodity futures market work . . . ." Bromberg & Lowenfels, *supra*, at § 4.6 (462).

Indeed, there is no bright-line difference between hedgers and speculators. Hedgers frequently do not merely balance their cash market risks in the futures market but engage in some speculation as well, buying or selling more or less futures contracts based on price expectations. Note, *Abuses in the Commodity Markets: The Need for Change in the Regulatory Structure*, 63 Geo. L. J. 751, 768-70 (1975); Valdez, *supra*, 13 Harv. J. Legis. at 64-65. On the other hand, speculators can become involved in the cash market as the activities of the plaintiff Incomco will demonstrate.

II. THE ALLEGED FACTS AND THE PROCEEDINGS BELOW

The facts alleged in the three complaints here before us are broadly as follows:[4]

John Richard Simplot is an Idaho potato entrepreneur who controls J. R. Simplot and Co., Simplot Products Co., Inc., and Simplot Industries, Inc. These corporations are responsible for the processing of approximately 50% of all Idaho potato products processed and sold in the United States. Peter J. Taggares is a Washington potato entrepreneur. He and his company, P. J. Taggares Co., process approximately 30% of all the Washington potatoes processed and sold in this country. Simplot and Taggares are equal partners in the ownership of Simtag Farms, a large farm in the State of Washington for the growing and warehousing of potatoes. Together Simplot, Taggares, and the companies they control are the largest purchasers of potatoes throughout the western potato region of Washington, Idaho and Oregon.

According to the complaints, Simplot, Taggares, and the companies controlled by them, together with numerous co-conspirators, embarked in the spring of 1976 on a conspiracy to depress the price of the May 1976 Maine potato futures contract traded on the floor of the New York Mercantile Exchange (the "short conspiracy"). As stated by one of the complaints, "[b]y virtue of their position in the potato processing field and the quantity of potatoes purchased by them, [the

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4 We say here once and for all that our statement, in large measure, is simply what the plaintiffs contend to be the facts and is not to be read as one of facts found. Accordingly we will generally dispense with use of words such as "allegedly", "asserted" and "claimed".

conspirators] would be in a position to control the prices paid for potatoes but for the existence of the Exchange and the activity . . . in buying and selling potato futures contracts." Simplot had encountered difficulties in the course of his customary negotiations with the Idaho Potato Growers Association, because the IPGA believed that the price of potatoes, including Maine potatoes, would be much higher than what Simplot was offering. Futures prices supported this view. A report issued on April 13, 1976 by the United States Department of Agriculture indicated that total potato stocks were down 11%, and that Maine stocks totalled only 7.4 million cwt. compared with 13.0 million cwt. on hand the previous year. An earlier report issued in August 1975 estimated that national potato acreage would be down 8% from the previous year with an even greater drop in Maine. The effect of this latter report, and other generally available information, was to drive the price of the May 1976 Maine contract from $9.75 per cwt. to a record high of $19.15 per cwt. by October 3, 1975. The activities of the short conspirators were designed to counteract the impact of these reports and other market information and rumors tending to raise the price of Maine futures. A decline in the price of potato futures would suggest to those dealing in the cash market, such as the IPGA, that supplies of Maine potatoes would be greater than earlier anticipated, and that prices in spot transactions or negotiations for all potatoes should correspondingly recede.

The primary means by which the short conspirators sought to depress the futures price was the accumulation of a large net short position in the May contract. The conspirators allegedly agreed to sell a large number

of contracts short and to refuse to liquidate these shorts at a price higher than that agreed among themselves and, if necessary, to default on the obligation to make delivery on all unliquidated contracts. Such short purchases would give the impression of the existence of a large supply of deliverable Maine potatoes and drive down the price of the contract.

Simplot made $1 million available to Simtag Farms, which Simtag used to open a credit balance on March 29, 1976, with Pressner Trading Corp., a member of the New York Mercantile Exchange (the Exchange or NYME), for the purpose of buying and maintaining short positions in the May contract. At the same time, Simplot, Taggares and their other companies also began to accumulate a large number of short contracts. The brokers through which the conspirators acquired their positions included Clayton Brokerage Co. of St. Louis, Inc. (Clayton), Heinold Commodities, Inc. (Heinold), and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc. (Thompson). These three brokerage firms were, like Pressner Trading, clearing members of the Exchange and appropriately registered with the CFTC. The firms allegedly knew, or should have known, that their customers neither intended to nor would be able to cover the large number of short positions the brokers acquired for them.

On May 4, 1976, Simplot and Taggares were warned by the CFTC that it was aware of their large short position and that price manipulation was a violation of the Commodity Exchange Act. The telegram concluded that although this "is not an allegation of price manipulation, if prices of the May 1976 potato future . . . should become artificial during liquidation due to

your action or inaction, we will consider whether you and your firm should be charged with price manipulation under the Commodity Exchange Act." In the face of this warning, and the impending close of trading on May 7, the conspirators not only failed to take steps to liquidate their large short position but actually increased it, again with the help and support of the named brokerage firms. On the last day of trading they consolidated all the short positions they controlled in the hands of Pressner. Clayton, Thompson and Heinold knowingly acquiesced in this consolidation designed to concentrate the force of the manipulation.

In addition to the accumulation of a large net short position which they refused to liquidate at higher than an agreed price, the conspirators also allegedly manipulated the futures price by shipping large quantities of unsold Idaho potatoes to the Maine markets for immediate sale at the going price. The use of such so-called "roller cars", railroad cars of potatoes shipped although there is no pre-determined buyer, tends to depress the market price, and thus affect futures prices.

Simplot and Taggares were not the only group manipulating the price of the May future. A second group of eastern conspirators thought they could beat the western producers at their own game. Harold Collins and Casper Mayrsohn are Maine potato merchants and traders in Maine futures. MFX Commodities, Inc., with Donald Silver as its president, is a foreign corporation engaged in business as a FCM. This group learned of the conspiracy of Simplot and Taggares and conspired to squeeze them. Pursuant to this conspiracy (the "long conspiracy"), the "long" group purchased as many contracts as it could, and then at

the same time maneuvered to tie up the cash potato market so that the shorts could not make delivery. The longs reasoned that if the shorts had no access to deliverable potatoes, the longs would be able to dictate the price the shorts would have to pay to liquidate their contracts. The main way in which the longs tied up the cash markets was by tying up all of the rail cars of the Bangor & Aroostook Railroad, which alone could deliver potatoes to satisfy May futures contracts. This was done by using the cars for phony export shipments and leaving them loaded or only partially unloaded when they reached appropriate destinations.

Neither the longs nor the shorts would give in to the other. The shorts refused to liquidate their position by buying offsetting long contracts at higher than the price agreed among them; the longs refused to come down to the unreasonably low price demanded by the shorts. At the end of trading on May 7, the short conspirators controlled 1893 open short positions. The long conspirators controlled 911 open long positions. There are usually only approximately 200 open contracts at the end of trading on the May potato future.

The plaintiffs were caught in the middle between these two competing conspiracies. Neil Leist is a duly licensed member of the Exchange engaged in the business of trading commodities and futures for his own account. Incomco, a partnership, is a duly licensed FCM. Philip Smith is Incomco's managing partner. The class action plaintiffs are traders and dealers representing all persons "who held a net long position in Contracts and who liquidated their long position in said contract between April 13, 1976 and the close of trading on the Exchange on May 7, 1976."

On the basis of the same sort of information which motivated Simplot and Taggares to conspire to depress the price of the contract, plaintiffs believed there was an investment opportunity on the long side of the contract. If there was going to be a shortage of deliverable Maine round whites, those committed to deliver potatoes at a set price might well find this price to be under what the potatoes were worth. The shorts would then have to sustain a loss, either by purchasing potatoes in the cash market for the higher price and delivering them for the lower futures contract price, or by purchasing an offsetting long position. The price of the long position should have gone up due to the shortage, so that the shorts would lose the differential in liquidating. The shorts' loss would be the longs' gain, and it is this gain which the plaintiffs sought to realize by their investment.

All the plaintiffs invested heavily on the long side of the May contract. In addition, Incomco developed a position in the cash market. It had accepted 1,500,000 pounds of Maine potatoes delivered to it pursuant to the March futures contract, and planned to sell these potatoes to those short the May contract who needed supplies to satisfy their delivery obligations. Anticipating a cash market shortage, Incomco expected to sell its potatoes at a handsome premium.

Because of the conspiracies, however, plaintiffs not only did not realize the gains they claim they would have had in an unmanipulated market but suffered losses. The short conspirators continued to accumulate short positions when they should have been trying to liquidate by purchasing long contracts from plaintiffs, and refused to liquidate above a set price. In the face of the unnaturally falling price, the plaintiffs were forced

out of the market at a loss. Because the long conspirators had successfully tied up all the freight cars of the Bangor & Aroostook, Incomco was unable to deliver its warehoused potatoes to persons seeking delivery to fulfill short contracts. As the warm weather set in, the 1,500,000 pounds of potatoes became rotten, and Incomco's total investment was lost.

The Exchange allegedly figured in this debacle almost from the start. In March, Richard Levine, president of the Exchange, told plaintiff Leist that the Exchange was investigating the large number of open positions in the May contract. On April 28, two members of the CFTC eastern region office, Howard Bodenhamer and Marshall Horn, met with Levine and Howard Gabler, vice-president of the Exchange, to express their concern over the problems developing with the May contract. Levine recognized the problem and expressed the view that Simplot might be trying to create difficulties in the contract. A second meeting took place two days later, at which Bodenhamer told Levine that the Commissioners felt that "the Exchange should take more action than less to bring about orderly liquidations of the maturing futures."

Levine did not report these meetings with the CFTC to the Exchange's Board of Governors until after the close of trading on the May contract. Although the Exchange knew, or should have known, of both the short and the long conspiracies, it took no action to prevent manipulation of the market. The Exchange failed to declare an emergency situation pursuant to its rules to facilitate orderly liquidation, and, once trading had closed, failed to take appropriate steps such as permitting delivery by truck or buying potatoes to cover the default of the shorts.

The complaint in *Leist* v. *Simplot* was filed in the District Court for the Southern District of New York on September 30, 1976. Count I, directed against the short conspirators and their brokers, charged that the activities of the group constituted violations of 7 U.S.C. §§ 1-13 and, more specifically, that the group used and employed manipulative devices and contrivances in violation of 7 U.S.C. § 13, which makes such action a felony, and of rules promulgated by the CFTC. In addition to naming the brokers as conspirators, Count I specifically alleged that they "failed and neglected to enter liquidating orders" for the short conspirators prior to the close of trading "even though they knew that such short positions could not be covered and that there would be a default if the accounts were not closed out", permitted the short sales to be made and cooperated in making such short sales "although they knew or should have known that the sellers did not intend to and would be unable to cover such short positions." Count II of the complaint charged various violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, which are not subject to the present appeal. Count III was directed against the long conspirators, describing the facts outlined above and charging that such conduct violated 7 U.S.C. §§ 1-13. Count IV was directed against the Exchange and its officials. After repeating the earlier general allegations against the short conspirators, the complaint charged that these defendants "negligently failed to maintain an orderly market for trading in Maine Futures in violation of the duties imposed upon them under the provisions of the Act." The Exchange was also charged with failing to report the various violations alleged by the plaintiffs.

and with failing to direct the entry of liquidating orders for the account of members with net short positions prior to the close of trading even though the Exchange officials knew or should have known that the sellers would not and could not make delivery if the positions remained open.

The complaint in *Incomco* v. *New York Mercantile Exchange* was filed in the District Court for the Southern District of New York on June 16, 1976. This complaint was directed at the long conspirators and the Exchange, "acting separately and also in concert with" the long conspirators, for "blocking the availability of railroad cars, thereby creating an artificial and manipulative railroad car shortage" in violation of the Commodity Exchange Act, and against the Exchange for failing to follow its own regulations requiring it to buy in the cash market for the account of delinquent sellers so that outstanding obligations will be fulfilled. As in *Leist* v. *Simplot*, plaintiffs also included an antitrust charge.

The complaint in *National Super Spuds* v. *New York Mercantile Exchange* was filed in the District Court for the Southern District of New York on May 26, 1976. After consolidation with other actions and amendment, this class action complaint charged that the activities of the short sellers described above "violated the applicable provisions of the Commodity Act [and] acted as a manipulative force which artificially lowered the price of the Contract." Count II charged the short sellers with exceeding position and trading limits set by the CFTC in 17 C.F.R. § 150.10. Count IV was directed against the brokers for the short sellers, charging them

with violating Exchange Rule §§ 44.02[5] by failing to have liquidating orders placed although they knew or should have known that their customers could not deliver potatoes, permitting their customers to exceed position and trading limits imposed by the Act, and failing to report these and other violations of the Act, regulations, and Exchange rules by their customers of which they knew or should have known. Count V generally charged that the brokers, "with knowledge of intent of short Sellers to deflate the price of the Contract acquiesced and/or participated in the acts of Short Sellers." Count VI was directed at the Exchange, charging that it failed and neglected to report and concealed violations of the Act, regulations, and its own rules; failed and neglected to direct that liquidating orders be entered with respect to members which the Exchange knew or should have known would default; generally failed and neglected to perform its duties as a

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5 This reads as follows:

44.02-FINAL DAY OF TRADING

(a) On the final day of trading in the delivery month, it shall be the responsibility of each clearinghouse member who is not in a position to fulfill his contractual obligation on any maturing contract by prescribed notice and tender, to have a liquidating order entered on the Exchange floor not later than five minutes before the time established as the official close for such delivery month. All such orders shall be market orders to be executed prior to the expiration of trading.

(b) On the final day of trading no stop orders will be accepted; no time limit or contingent orders will be accepted, and brokers will not be expected to assume responsibility for the execution of orders placed later than 15 minutes prior to the close of trading.

(c) Cancellations that reach the trading floor after one half (½) hour prior to the time trading is scheduled to cease on the last day of trading in an expiring future may involve extraordinary problems and hence will be accepted solely at the risk of the customer.

contract market; and failed and neglected to exercise due care to halt manipulative practices. The three actions, all claiming extensive compensatory and punitive damages, were consolidated.

After answers had been filed and extensive discovery had been had, one phase of which has occupied the attention of this court, see *National Super Spuds* v. *New York Mercantile Exchange*, 591 F.2d 174 (2 Cir. 1979), three brokers, Clayton, Heinold and Thompson, and the Exchange and Exchange officials moved in the different actions for judgment on the pleadings under Fed. R. Civ. P. 12(c) or, in the alternative, for partial summary judgment under Fed. R. Civ. P. 56(b). Since he believed that all the parties had submitted factual material outside the pleadings, the judge considered the motions under Rule 56(b), although in fact the dispositive reasons so far as concerned the claims under the Commodity Exchange Act, which were all that were raised by the Exchange, the Exchange officials and Thompson, seem to have been wholly ones of law which could have been raised as well when the complaints had been filed two years earlier. In a thoughtful opinion issued on May 29, 1979, 470 F.Supp. 1256, Judge MacMahon held that there was no private right of action for damages under the Commodity Exchange Act, and granted summary judgment in favor of the moving defendants on those counts seeking recovery under that Act.[6] Partial final judgment was entered under Fed. R. Civ. P. 54(b) in favor of the moving defendants, and the plaintiffs took the instant appeal.

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6 For a precise statement of the motions and their disposition, see 470 F.Supp. at 1257 n.1, 1263-64.

III. THE HISTORY OF CONGRESSIONAL REGULATION OF COMMODITY FUTURES TRADING

Although our immediate concern is with the Commodity Exchange Act (CEA) as it now stands, it will be useful at this point to review the long history of Congressional regulation of commodity futures trading.

The first effort at such regulation was the Future Trading Act, 42 Stat. 187 (1921). This established the basic pattern of all regulation to follow, concentrating trading on central exchanges subject to the supervision and control of the federal government. The 1921 act levied a tax on all grain futures contracts not traded on a designated contract market. The Secretary of Agriculture was authorized to designate a board of trade as a "contract market" when the board, *inter alia*, "provides for the prevention of manipulation of prices." § 5(d), 42 Stat. 188. This provision has remained virtually unchanged to the present day, and is one of the provisions upon which plaintiffs seek to base a private right of action against the Exchange. The act also empowered a commission composed of the Secretary of Agriculture, Secretary of Commerce, and the Attorney General to suspend or revoke the designation of any board of trade failing to comply with the conditions of its designation, § 6(a), 42 Stat. 188, and to preclude any person violating the act or attempting to manipulate prices from trading on designated contract markets, § 6(b), 42 Stat. 189. Failure to pay the appropriate tax or keep required records made the violator guilty of a misdemeanor with a fine of up to $10,000 and/or imprisonment for up to one year. § 10, 42 Stat. 191.

The Future Trading Act was declared to be an unconstitutional exercise of the taxing power in *Hill* v. *Wallace*, 259 U.S. 44 (1922). It was redrafted immediately and enacted as the Grain Futures Act, 42 Stat. 998 (1922). The offending tax provision was deleted, and Congress, relying now on the commerce power, simply made it unlawful for any person to deal in futures contracts off a designated contract market, § 4, 42 Stat. 999-1000. The other operative provisions of the 1921 act were retained, with the aforementioned penalties now activated by violation of § 4 rather than the failure to pay a tax. A section on purposes was added, § 3, 42 Stat. 999. This section has been carried over virtually unchanged to the present day, see 7 U.S.C. § 5. The 1922 act was declared a constitutional exercise of the commerce power in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923). The 1921 and 1922 acts established the basic pattern of limiting trading to designated exchanges and regulating that trading by controlling designation of and access to the contract markets. The fine and imprisonment scheme for violations was also established.

Major additions, rather than revisions, were enacted by the Commodity Exchange Act, 49 Stat. 1491 (1936). Coverage was extended beyond grains to include commodities such as cotton, butter, and eggs. Section 4a was added, empowering the commission of the Secretary of Agriculture, Secretary of Commerce, and Attorney General to fix quantitative limits on speculative trading.[7] Here the short conspirators, with the

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[7] This provision currently reads as follows:

(1) Excessive speculation in any commodity under contract of sale of such commodity for future delivery made on or subject to

knowledge of the appellee FCM's, are alleged to have violated limits promulgated pursuant to this section. 17 C.F.R. § 150.10. The 1936 revisions also added § 4b, 49 Stat. 1493, the antifraud provision, essentially in its

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the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.

* * * * *

(2) The Commission shall in such order fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the Commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

present form.[8] New section 4d required the registration of FCM's and section 4e of floor brokers, while section 4g provided for the suspension or revocation of these registrations for violation of the Act or rules adopted thereunder. Section 5a added new duties of reporting for contract markets and some substantive obligations as well. Fines and imprisonment sanctions were extended to cover violations of the newly enacted provisions as well as old § 4, and were also applied to

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8 This provision currently reads as follows:

> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—
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> (A) to cheat or defraud or attempt to cheat or defraud such other person;
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> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
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> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or exchange of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
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> (D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

anyone attempting to manipulate or manipulating the price of any commodity. 49 Stat. 1501.

By 1936, then, the major provisions which assertedly form the bases of the implied right of action against the FCM's, the trading limit, antifraud, and antimanipulation provisions, were already in place. One of the two additional provisions allegedly affording the basis for an action against the Exchange, § 5(d), had been law since 1921 and the other, § 5a(8), would be added in 1968.

The 1968 amendments, 82 Stat. 26, extended regulation to new commodities such as live cattle and pork bellies. The amendments added § 5a(8), as noted above, requiring a contract market to enforce all of its rules not disapproved by the Secretary of Agriculture.[9] Corresponding § 8a(7) was added empowering the Secretary to disapprove rules which violate or will violate the act or regulations. The penalty provision was altered somewhat, making FCM embezzlement and price manipulation felonies instead of misdemeanors, with a maximum prison term of five years instead of one. 82 Stat. 33-34. Section 6b was added, granting the Secretary the power to issue cease and desist orders against a contract market not enforcing its rules or violating the act. 82 Stat. 31-32.

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[9] This provision currently reads as follows:

> (8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of section 5a of this Act; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission.

In contrast to the limited scope of the 1968 amendments, the 1974 amendments, 88 Stat. 1389 (1974), constituted a complete overhaul of the Act. They broadened its coverage from the agricultural commodities with which it had historically been concerned to include "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in", subject to certain exceptions designed primarily to exclude securities. Consistently with this expansion in coverage, enforcement was transferred from the Department of Agriculture to a newly constituted Commodity Futures Trading Commission (CFTC). However, the amendments did not substantially alter any of the provisions which assertedly form the bases of an implied right of action. The antifraud and trading limits sections were basically unchanged. Maximum fines were increased from $10,000 to $100,000 in the penalty section.[10] Section 5(d), requiring a contract

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10 This provision currently reads as follows:

> It shall be a felony punishable by a fine of not more that $500,000 or imprisonment for not more than five years, or both, together, with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or to attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce or knowingly to violate the provisions of section 4, section 4b, section 4c(b) through section 4c(e), section 4h, section 4o(1), or section 19 of this Act, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is

market as a condition of designation, to prevent manipulation and cornering, remained unchanged, and § 5a(8) was altered so that exchanges were required to enforce their rules *approved* by the CFTC rather than those rules not *disapproved* by the Secretary.

The 1974 amendments required contract markets to provide arbitration procedures for settlement of customer grievances and claims not exceeding $15,000, § 5a(11). The CFTC was vested with power to compel exchanges to adopt additional rules, § 8a(7), and to bring actions to enjoin violations of the Act and compel compliance through writs of mandamus, § 6c. Finally, the reparations procedure in § 14 was established, of which more hereafter.

The history of congressional concern with commodity futures trading has thus been one of steady expansion in coverage and strengthening of regulation. In 1936, 1968, and 1974 new commodities came under the CEA. In each of these years the power of the regulatory authority were augmented, and penalties were either extended, increased, or both. The question of Congressional intent with respect to private sanctions under the Act must be considered against this background of increasingly strong regulation designed to insure the existence of fair and orderly markets.

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required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

IV. PRIVATE CAUSES OF ACTION UNDER THE COMMODITY EXCHANGE ACT PRIOR TO THE 1974 AMENDMENT

During the late 1940's, the 1950's, the 1960's and the early 1970's there was widespread, indeed almost general, recognition of implied causes of action for damages under many provisions of the Securities Exchange Act, including not only the antifraud provisions, §§ 10 and 15(c)(1), see *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512, 513-14 (E.D. Pa. 1946); *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2 Cir. 1951) (Frank, J.); *Fratt* v. *Robinson*, 203 F.2d 627, 631-33 (9 Cir. 1953), but many others. These included the provision, § 6(a)(1), requiring securities exchanges to enforce compliance with the Act and any rule or regulation made thereunder, see *Baird* v. *Franklin*, 141 F.2d 238, 239, 240, 244-45 (2 Cir.), *cert. denied*, 323 U.S. 737 (1944),[11] and provisions governing the

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11 While the point is of no great importance as regards this case, we take issue with the statements in the dissent, page 38, that *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2 Cir.), *cert. denied*, 385 U.S. 81 (1966), held that violation of a rule of the New York Stock Exchange could not give rise to an implied cause of action. Our conclusion was that violation of certain types of rules would give rise to an implied cause of action, especially "when the rule imposes an explicit duty unknown to the common law", but that violation of the rule there at issue, requiring brokers to observe "just and equitable principles of trade", did not. *Id.* at 182-83. We likewise do not accept the statement in footnote 8 that "it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange," citing *Jablon* v. *Dean Witter & Co.*, 614 F.2d 677 (9 Cir. 1980). Although the particular rule at issue in *Jablon*, the "know your customer" rule, Rule 405 of the New York Stock Exchange, seems analogous to the rule at issue in *Colonial Realty* and we thus have no quarrel with the result, we do not necessarily accept the broad language of the *Jablon* opinion. In view of our conclusion that plaintiffs have alleged violations of other sections of the Act which give rise to private claims, it is

solicitation of proxies, see *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431-35 (1964). The *Baird* case is of special importance since the claim was of failure of the New York Stock Exchange to perform its duties—a claim paralleling that asserted here against NYME. Writing in 1961, Professor Loss remarked with respect to violations of the antifraud provisions that with one exception "not a single judge has expressed himself to the contrary." 3 Securities Regulation 1763-64. See also Bromberg & Lowenfels, *supra*, § 2.2 (462) (describing 1946-1974 as the "expansion era" in implied causes of action under the securities laws). When damage actions for violation of § 10(b) and Rule 10b-5 reached the Supreme Court, the existence of an implied cause of action was not deemed worthy of extended discussion. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).[12] Implied private

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unnecessary for us now to decide whether such an action would lie for violation of NYME Rule § 44.02.

So far as concerns the dissent's citation of *O'Neill* v. *Maytag*, 339 F.2d 764 (2 Cir. 1964), as a case denying a private right of action in the securities area, that decision rested on the scope of Rule 10b-5 and in no way challenged the proposition that a private cause of action would lie if the facts came within the Rule.

12 Indeed, at the time Congress considered and passed the 1974 amendments to the CEA, the Supreme Court had never rejected a request to imply a cause of action under the federal securities laws. Pitt, *Standing to Sue Under the Williams Act After Chris-Craft*, 34 Bus. Law. 117, 121 (1978).

The suggestion in the dissent that the *Superintendent of Insurance* case was a grudging acquiescence in 25 years of lower court decisions, although finding some support in a footnote to *Cannon*, 404 U.S. at 13 n.9, ignores the language of the opinion in *Superintendent of Insurance* and the climate of the times. The Supreme Court there reversed a decision of this court refusing to apply § 10(b) under circumstances which pressed that section to its absolute limit. The Court quoted not simply in acquiescence but with

causes of action under other statutes administered by the SEC were also widely recognized, see, e.g., *Goldstein* v. *Groesbeck*, 142 F.2d 422, 426-27 (2 Cir.), *cert. denied*, 323 U.S. 737 (1944) (Public Utility Holding Company Act); *Cogan* v. *Johnston*, 162 F.Supp. 907 (S.D.N.Y. 1958); *Schwartz* v. *Bowman*, 156 F.Supp. 361 (S.D.N.Y. 1957), appeal dismissed but holding on this point approved, *Schwartz* v. *Eaton*, 264 F.2d 195, 197-98 & n.5 (2 Cir. 1959); *Brown* v. *Bullock*, 194 F.Supp. 207, 220-21 (S.D.N.Y.), aff'd, with appellant conceding this point, 294 F.2d 415, 418 (2 Cir. 1961)(Investment Company Act);[13] see also *Caplin* v. *Marine Midland Grace Trust Co.*, 439 F.2d 118, 123 n.5 (2 Cir. 1971)(dictum), aff'd 406 U.S. 416, 426 n.17 (1972)(Trust Indenture Act). These statutes contained a

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strong approval the statement in *Shell* v. *Helmsley*, 430 F.2d 819, 827 (5 Cir. 1970):

> When a person who is dealing with a corporation in a securities transaction denies the corporation's directors access to material information known to him, the corporation is disabled from availing itself of an informed judgment on the part of its board regarding the merits of the transaction. In this situation the private right of action recognized under Rule 10b-5 is available as a remedy for the corporate disability.

And all this under a statute which *expressly* created three private actions, §§ 9(e), 16(b) and 18, with respect to various types of securities transactions that were far more efficacious than the reparations procedure of the 1974 amendments to the CEA. See 6 Loss, Securities Regulation at 3689-73 (1969), suggesting that for this and other reasons the *Borak* decision would not necessarily preclude a different ruling with respect to the existence of a private cause of action under § 10(b)—a ruling which never came.

13 Indeed, in several important cases under the Investment Company Act, defendants represented by able counsel did not even think it worthwhile to question the existence of an implied private cause of action. See, e.g., *Rosenfeld* v. *Black*, 445 F.2d 1337 (2 Cir. 1971), *cert. dismissed* 409 U.S. 802 (1972); *Moses* v. *Burgin*, 445 F.2d 369 (1 Cir.), *cert. denied* 404 U.S. 994 (1971); *Fogel* v. *Chestnutt*, 533 F.2d 731 (2 Cir. 1975), *cert. denied*, 429 U.S. 824 (1976).

panoply of other remedies—enforcement by the SEC, suspension, civil fines, criminal penalties, and some express private actions—which, with the exception of the administrative reparations remedy against one type of violator, were every bit as or more extensive than those in the CEA, but arguments that such provisions negated an implied private cause of action were regularly and firmly rejected, see, e.g., Judge Clark's much cited opinion in *Baird* v. *Franklin*, *supra*, 141 F.2d at 244-45; *Goldstein* v. *Groesbeck*, *supra*, 142 F.2d at 426-27; *Fratt* v. *Robinson*, *supra*, 203 F.2d at 632; *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201, 208-09 (6 Cir. 1961). The question here is not whether all these decisions were wrong in the light of Supreme Court opinions of the past four years, as the dissent necessarily implies, but whether the 1974 Congress was not justified in assuming they would be followed with respect to the CEA.

Neither the generality and near unanimity of such interpretations of statutes regulating unfair securities practices, for which the CEA was the analogue with respect to futures trading,[14] nor similar decisions in

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[14] While there are differences between the commodities and securities fields, what is relevant to the present question is the common legislative objective of insuring fair dealing for investors on what are important public markets, and the common legislative approach to attaining this objective. The analogy between the two fields has been repeatedly recognized by Congress, see, e.g., S. Rep. No. 93-1131, *supra*, at 19; H. R. Rep. No. 93-975, *supra*, at 39. The 1936 amendments arose from an explicit concern to make protection in the commodities field as strong as it was in the securities field, lest the unscrupulous would simply transfer their operations from one market to another. H. R. Rep. No. 1522, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10446 (June 4, 1934) (Remarks of Chairman Jones of the House Committee on Agriculture); 79 Cong. Rec. 8589 (June 3, 1935) (same). The analogy has been frequently accepted by the courts, see, e.g., *Silverman* v. *CFTC*, 562 F.2d 432, 438 (7 Cir.

other fields, e.g., *Reitmeister v. Reitmeister*, 162 F.2d 691 (2 Cir. 1947)(action for damages implied from statute making interception of telephone calls a crime)(L. Hand, J.); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2 Cir. 1956) (action for damages implied from anti-discrimination provision of Civil Aeronautics Act although express remedies were complaint to CAB and criminal sanctions), were at all novel. They rested on principles recognized in a line of Supreme Court decisions going back to *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). *Rigsby* sustained the right of a switchman to recover damages for violation of the Federal Safety Appliance Acts although the only express sanctions were penal. The Court there stated:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a

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1977) (quoting Moore, J., in *Savage v. CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)); *P. J. Taggares Co. v. NYME*, 476 F.Supp. 72, 77-78 (S.D.N.Y. 1979) (Weinfeld, J.); by the CFTC, see, e.g., brief *amicus curiae* at 12; and by the commentators, see, e.g., Markham and Meltzer, *Secondary Liability Under the Commodity Exchange Act*, 27 Emory L. J. 1115 (1978); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 821-22 (1975). Congress was not only aware of the implied right of action under the CEA in 1974, as shown below, but surely was also aware of the private right of action recognized in the analogous field of securities regulation.

> remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (Per Holt, C.J., *Anon.*, 6 Mod. 26. 27.) 241 U.S. at 39.

Following *Rigsby* the Supreme Court recognized implied causes of action on numerous occasions, see, e.g., *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967) (sustaining implied cause of action by United States for damages under Rivers and Harbors Act for removing negligently sunk vessel despite express remedies of *in rem* action and criminal penalties); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (sustaining implied cause of action by United States for an injunction under the Rivers and Harbors Act); *Tunstall v. Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (sustaining implied cause of action by union member against union for discrimination among members despite existence of Board of Mediation); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (sustaining implied private cause of action under 42 U.S.C. § 1982); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (sustaining implied private cause of action under § 5 of the Voting Rights Act despite the existence of a complex regulatory scheme and explicit rights of action in the Attorney General); and, of course, the aforementioned decisions under the securities laws. As the Supreme Court itself has recognized, the period of the 1960's and early 1970's was one in which the "Court had consistently found implied remedies." *Cannon v. University of Chicago*, 441 U.S. 677, 698 (1979); *id.* at 718 (Rehnquist, J., concurring) ("Cases such as *J. I.*

Case Co. v. Borak . . . and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task"). See generally Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285 (1963).

Given so many cases implying private rights of action under a broad range of statutes, both cognate (as in the instance of the securities legislation) and otherwise, supported by a goodly number of Supreme Court decisions and the reasoning behind them,[15] it was scarcely surprising that the courts that considered the question prior to the 1974 amendments unanimously upheld the implication of a private cause of action under the CEA. Indeed in the climate then prevailing it would have been almost unthinkable for the lower courts to have held that administrative and penal

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15 Although it is true, as stated in Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. at 735, that "During this same period, the Court frequently turned back private plaintiffs seeking to imply causes of action from federal statutes," 411 U.S. at 735, citing the same cases mentioned in Judge Mansfield's dissent, there can be no doubt that particularly in the closely related field of violations of statutes administered by the SEC, the implied cause of action was so much taken for granted that usually the issue was not even raised. See note 13 *supra*. There are many instances of this under the CEA itself, both before and after the 1974 amendments. See, e.g., *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8 Cir. 1970); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1176 (2 Cir. 1977) ("It is agreed that there is an implied cause of action under the Act for a private remedy."); *Hofmayer v. Dean Witter & Co., Inc.*, 459 F.Supp. 733, 737 (N.D. Cal. 1978). In addition, several courts have begun the process of delineating the precise contours of the private cause of action under the CEA, aided of course by the securities law analogy, assuming either *arguendo* or implicitly that such an action exists. See, e.g., *Miller v. New York Produce Exchange*, 434 U.S. 823 (1977); *Master Commodities, Inc. v. Texas Cattle Management Co.*, 586 F.2d 1352 (10 Cir. 1978); *Moody v. Bache & Co., Inc.*, 570 F.2d 523 (5 Cir. 1978); *P. J. Taggares Co. v. NYME*, *supra*, 476 F.Supp. 72.

remedies were adequate for the enforcement of private claims for economic loss caused by violation of this important effort by Congress to regulate the commodity futures markets. And they did not. The first reported case, frequently cited in later decisions, was *Goodman v. H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967).[16] The unbroken line of decisions upholding a private right of action under pre-1974 law includes cases frm all of the major centers of activity in the commodity futures field. *Anderson v. Francis I. duPont & Co.*, 291 F.Supp. 705, 710 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F.Supp. 417, 437 (N.D. Cal. 1968), modified, 430 F.2d 1202 (9 Cir. 1970); *United Egg Producers v. Bauer International Corp.*, 11 F.Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8 Cir. 1970); *McCurnin v. Kohlmeyer & Co.*, 340 F.Supp. 1338, 1343 (E.D. La. 1972), aff'd, 477 F.2d 113 (5 Cir. 1973); *Gould v. Barnes Brokerage Co., Inc.*, 345 F.Supp. 294, 295 (N.D. Tex. 1972); *Johnson v. Arthur Epsey, Shearson, Hamill & Co.*, 341 F.Supp. 764, 766 (S.D.N.Y. 1972);

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16 The dissent's suggestion, p. 36, that victims of frauds in futures trading had never resorted to the federal courts prior to *Goodman*, which was "the first case to break the barrier", lacks adequate empirical basis. Judge Carter's opinion in the Salad Oil case, *Seligson* v. *New York Produce Exchange*, *supra*, 376 F.Supp. at 1080, rendered in 1974, tells us that this swindle of the early 1960's "led to a string of lawsuits and investigations extending over the past ten years." It is not unlikely that many counsel for defendants confronted with the array of cases under the statutes administered by the SEC, did not think it worthwhile to question the existence of a private cause of action under the CEA—just as their counterparts in well-known cases under the Investment Company Act had failed to do so, see note 13 *supra*.

While we think the dissent's attacks on the reasoning of *Goodman* are exaggerated, this is irrelevant, since the courts followed and extended it without the slightest question, and Congress necessarily regarded these decisions, stretching over seven years, as representing the law.

Arnold v. Bache & Co., 377 F.Supp. 61, 65 (M.D. Pa. 1973); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7 Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (per curiam); *Seligson v. New York Produce Exchange*, 378 F.Supp. 1076, 1084 (S.D.N.Y. 1974), *aff'd sub nom. Miller v. New York Produce Exchange*, 550 F.2d 762 (2 Cir.), *cert. denied*, 434 U.S. 823 (1977).

It is true that most of these cases concerned fraud by a broker against his customers or churning of a customer's account, which was clearly within § 4b of the Act, but none stressed the broker-customer relation as either the basis or the limit of liability. And several did *not* involve fraud practiced by a broker on his customers. The most important of these is *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529 (7 Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 11 (1973). Two cases were before the court. Plaintiffs in the first case sued the Exchange and various members alleging that the defendants manipulated the futures market for frozen pork bellies, a violation of CEA § 9(b), 7 U.S.C. § 13(b), artificially raising the price and thereby injuring those who, like the *Deaktor* plaintiffs, had sold short and were forced to liquidate their positions at higher prices (the converse of the situation of the plaintiffs in our case). The Exchange was also charged with violating CEA § 5a(8), 7 U.S.C. § 7a(8), the provision requiring an exchange to "enforce all bylaws, rules, regulations, and resolutions". Plaintiffs in the second case charged the Exchange with monopolizing trading in the fresh egg futures market, causing the price to fall and forcing plaintiffs to sell at artificially depressed prices. This conduct was alleged to violate the notice and hearing

provisions in Rule 217(D) of the Exchange, CEA §§ 52(8) and 9(b)(the criminal penalty provision for manipulation), 7 U.S.C. §§ 7a(8), 13(b), and the Sherman Act. The case reached the Seventh Circuit on denials of motions by the Exchange and other defendants to stay district court action pending the exercise of primary jurisdiction by the Commodity Exchange Commission. Having declined to defer to the primary jurisdiction of the Commission, the court reached the question whether private damage actions were allowable under the CEA. Citing numerous cases, the *Deaktor* court stated that "courts which have considered the question . . . have apparently uniformly concluded that such an action exists." *Id.* at 534. The court noted that the purpose of the Act was, in the language of the congressional reports, "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." The court further noted that § 9(b) of the Act made it a felony to manipulate prices, and concluded that in light of this provision and the general purpose of the Act, "we think the enactment is at least in part intended to protect the interests of the plaintiffs-traders in these actions," and therefore held that plaintiffs had a cause of action. *Id.* Thus, immediately before consideration of the 1974 amendments began, and only one year prior to their enactment by the Congress, the Court of Appeals with jurisdiction over the center where approximately 80% of all futures contracts were traded in the United States had clearly held that a private cause of action existed under the CEA—not simply for fraud by a

broker on his customer but for manipulation as well. The notion, strongly emphasized by the dissent, that such a decision escaped the knowledge of those framing the amendments, seriously underrates the expertise of our lawmakers and their staffs in subjects of particular concern to them.

Far from undermining the Seventh Circuit's recognition of an implied cause of action, the Supreme Court's reversal, 414 U.S. 113 (1973) (per curiam), on the ground that the court should have deferred to the primary jurisdiction of the Commission implicitly affirmed this recognition. Noting that " 'Congress has established a specialized agency that would determine either that a . . . rule of the Exchange has been violated or that it has been followed . . . ' ", the Court emphasized that " 'Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules . . . ' " and that " 'either determination will be of great help to the . . . court . . . . ' " *Id.* at 115, quoting *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 307 (1973). Thus the Court's reason for insisting on a determination by the Commission "in the first instance", 414 U.S. at 116, was that it would assist a court in hearing plaintiff's claims "in the second instance". The Court did not "decline to reach the issue" whether plaintiffs' claims were cognizable in federal court, as the dissent asserts (p. 40); it simply assumed that they were, as the Seventh Circuit had held.[16a]

Other cases upholding an implied cause of action outside the broker-customer relationship were *United*

[16a] Mr. Justice Stewart would have affirmed and allowed the action to proceed directly in the district court. 414 U.S. at 416.

Egg Producers v. Bauer International Corp., supra, 311 F.Supp. 1375, which recognized an implied cause of action under § 9(b) on behalf of various egg producers against an import-export firm, and *Seligson v. New York Produce Exchange, supra*, 378 F.Supp. 1076. *Seligson* arose out of the much-publicized "Salad Oil Swindle", and recognized an implied cause of action on behalf of the trustee in bankruptcy of a brokerage firm against the exchange, exchange officials, and the clearinghouse.[17]

While case based on pre-1974 facts decided after the 1974 amendment, apparently under pre-1974 law, are of less pertinence since the 1974 Congress could not have known of the decisions,[18] they deserve mention as

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17 We fail to appreciate the dissent's attempt to distinguish these two cases. With respect to *Egg Producers*, if implied private causes of action did not exist under the Act, there would be no cause of action for an injunction any more than there would be for damages. The *Seligson* decision was rendered before Senate consideration of the 1974 amendments and House repassage in the amended form. Moreover, what the dissent fails adequately to recognize is that the cases under the CEA, numerous and consistent as they are, cannot be taken in isolation but must be considered along with the vast body of law under the securities statutes which set the tone during the late '40's, the '50's, the '60's, and the early '70's, and on which the CEA decisions relied. The efforts to whittle all this away, pages 41-43, are unimpressive. We have already dealt, note 14 *supra*, with the argument as to the cases under Rule 10b-5. The contention that the securities legislation offered less in the way of remedies than the CEA would surprise most students of securities law; with the single exception of the 1974 reparations procedure for certain types of CEA violations, whose inadequacies are described below, they offered more. The argument that the sections of the CEA most heavily relied upon by plaintiffs were enacted before the explosion of the private right of action under the securities laws ignores the fact that the 1974 amendments to the CEA were intended to be a complete overhaul and were effected with vivid Congressional awareness of the decisions implying private causes of action under the CEA as well as the related subject of the laws administered by the SEC.

18 Congress was, however, apparently aware of the pendency of at least one of these cases. See note 30 *infra*.

indicative of the uncontradicted view of the law prevailing when Congress acted. In *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355 (7 Cir. 1975)(Cummings, Stevens, and Tone, JJ.), plaintiff sued the Board and its governors for violating §§ 5a(1) and 5a(8) of the CEA in suspending trading limits on soybean futures. The court began its discussion of liability by stating that "[i]t is undisputed that a private cause of action may be maintained under the Commodity Exchange Act. See *Deaktor* . . . ." *Id.* at 360. In *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7 Cir. 1977), the same court flatly stated that "[p]rivate damage actions are allowable under the CEA. See, e.g., *Deaktor* . . . ." See also *Bartley v. P.G. Commodities Associates, Inc.*, CCH Com. Fut. L. Rep. ¶ 20,123 [1975-77 Transfer Binder] (S.D.N.Y. 1975) (churning complaint under § 4b).

We see no need to burden this opinion with detailed examination of district court decisions concerning whether the 1974 amendments eliminated the private cause of action theretofore unanimously recognized. The courts have divided although the weight of authority is in favor of continued implication.[19] As noted, the only court of appeals to have considered the issue has held that a private cause of action should be implied. *Curran v. Merrill Lynch*, note 1 *supra*.

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19 Cases finding an implied cause of action: *Milani* v. *ContiCommodity Serv., Inc.*, 462 F.Supp. 405 (N.D. Cal. 1976); *Shearson Hayden Stone* v. *Lumber Merchants, Inc.*, 423 F.Supp. 559 (S.D. Fla. 1976); *Bache Halsey Stuart, Inc.* v. *French*, 425 F.Supp. 1231 (D.D.C. 1977); *Kelley* v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977), rev'd on other grounds, Nos. 78-1091, 1092, 5542, 5460 (6 Cir., May 16, 1980); *Hofmayer* v. *Dean Witter & Co.*, 459 F.Supp. 733 (N.D. Cal. 1978); *Berenson* v. *Madda Trading Co.*, CCH Comm. Fut. L. Rep. ¶ 20,689 (D.D.C. 1978); *Gravois* v. *Fairchild, Arabatzis & Smith, Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,706 (E.D. La. 1978); *Rivers* v.

V. THE CONTINUED EXISTENCE OF THE PRIVATE CAUSE OF ACTION

In deciding the issue here before us, we follow the analysis set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[20]

Rosenthal & Co., Civ. Action File No. CV 178-186 (S.D. Ga. 1978), appeal pending, 79-1313 (5 Cir.); *Poplar Grove Planting and Refining Co., Inc.* v. *Bache Halsey Stuart Inc.*, 465 F.Supp. 585 (N.D. La. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F.Supp. 213 (D. Kansas 1979); *R. J. Hereley & Son* v. *Stotler & Co.*, 466 F.Supp. 345 (N.D. Ill. 1979); *Aiken* v. *Lerner*, Civ. Action No. 79-0023 (D.N.J. 1980); *Navigator Group Funds* v. *Shearson Hayden Stone Inc.*, 77 Civ. 5350 (S.D.N.Y. 1980) (Broderick, J.); *Grayson* v. *Conticommodity Services, Inc.*, 48 L.W. 2807 (D.D.C., May 23, 1980); *Witzel* v. *Chartered Systems Corporation of New York, Ltd.*, 48 L.W. 2823 (D. Minn., May 27, 1980).

To the contrary, in addition to Judge MacMahon's opinion in this case, 470 F.Supp. 1256, see *Arkoosh* v. *Dean Witter & Co.*, 415 F.Supp. 535 (D. Neb. 1976), aff'd on other grounds, 571 F.2d 437 (8 Cir. 1978); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F.Supp. 447 (N.D. Ohio 1976); *Bartels* v. *International Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977); *Berman* v. *Bache Halsey Stuart, Shields, Inc.*, 467 F.Supp. 311 (S.D. Ohio 1979); *Alkan* v. *Rosenthal & Co.*, CCH Comm. Fut. L. Rep. ¶ 20,797 (S.D. Ohio 1979); *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979); *Fischer* v. *Rosenthal & Co.*, 481 F.Supp. 53 (N.D. Tex. 1979); *Stone* v. *Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. ¶ 31,100 (N.D. Ill. 1980). The three decisions from district courts in Ohio which declined to find an implied cause of action, *Consolo*, *Berman*, and *Alkan*, are no longer good law in that circuit in light of the Sixth Circuit's contrary decision in *Curran* v. *Merrill Lynch*, cited in note 1 *supra*.

20 This is:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp.* v. *National Assn. of*

There is, however, one differentiating factor of such transcendent importance as to demand mention at the outset. As shown in Part IV of this opinion the decisions prior to the 1974 amendments had uniformly upheld the existence of a private cause of action under the provisions of the Commodity Exchange Act, and as will be shown in this part, the 1974 Congress was well aware of the existing state of the law. Even without more, the question thus would not be whether Congress intended to create a new private right of action in 1974, but rather whether it intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act. Beyond this, however, we do not need to *assume*, as the Court stated would be "appropriate" in upholding a private cause of action in *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979), "that our elected representatives, like other citizens, know the law" or to "presume" that they "were aware of the prior interpretation" of a

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Railroad Passengers, 414 U.S. 453, 458, 460, 38 L. Ed. 2d 646, 94 S. Ct. 690 (1974) (*Amtrak*), *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423, 44 L. Ed. 2d 263, 95 S. Ct. 1733 (1975); *Calhoon* v. *Harvey*, 379 U.S. 134, 13 L. Ed. 2d 190, 85 S. Ct. 292 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 434, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971); *id.* at 400, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (Harlan, J., concurring in judgment).

We read this in light of the later *caveat* in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979) that the basic inquiry is always to plumb the intent of Congress, that the *Cort* factors are simply inquiries helpful in that endeavor, and that satisfaction of one or more of the *Cort* factors will not alone carry the day.

related statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute"). Here the existence of an implied right of action under the Commodity Exchange Act as it stood in 1974 was repeatedly called to the attention of and implicitly approved by Congress. This alone sufficiently answers appellees' claim that if the 1974 Congress wished to create a private cause of action, it would and should have said so and that it is implausible to suppose that "Congress absentmindedly forgot to mention an intended private action." *Cannon, supra*, 441 U.S. at 742 (Powell, J., dissenting). Whether rightly or wrongly in light of recent Supreme Court jurisprudence, the courts had read a private cause of action into the statute, just as they had done with statutes of similar import in related fields, and Congress knew that they had done so. The burden thus lies on those who urge that the 1974 amendments demonstrate an intention to change prior law, or, paraphrasing the language from Mr. Justice Powell's *Cannon* dissent, *supra*, that, in making the changes that it did, Congress "absentmindedly forgot" to repeal the private cause of action. The silence of the 1974 Congress with respect to private causes of action for violations of the CEA, on which the dissent leans so heavily, is no more significant than the similar silence of the 1975 Congress which extensively amended the Securities Exchange Act, 89 Stat. 97. When a principle has become settled through court decisions, there is no occasion for Congress to speak unless it wishes a change.[21]

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[21] We find little force in the dissent's reliance, page 33 and footnote 11, on the failure of the 1968 Congress to enact a section of a bill introduced by Representative Fino providing an explicit right of

1. Taking the first of the *Cort* factors, we have no difficulty in concluding, despite appellees' claims to the contrary, that the plaintiffs were among "the class for whose especial benefit the statute was enacted," a phrase going back to *Texas & Pacific R. Co.* v. *Rigsby*, *supra*, 241 U.S. at 39. Although Congressional committees and sponsors of the ill-fated 1921 legislation devoted most of their eloquence to injuries suffered by producers at the hands of wicked speculators, the Senate Report on the 1922 Act recognized that:

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action against exchanges. Quite apart from the usual problems of relying on actions of an earlier Congress, and much more on its failure to act, see p. 59 *infra*, the question of a private right of action was simply not considered by Congress in the 1968 amendment process. The bill that became the 1968 amendments, H. R. 13094, never contained a private remedy provision, such a remedy was never mentioned in either congressional report, and was never discussed in congressional debate. The dissent's picture of Congress' carefully comparing the bills and deliberately and meaningfully rejecting the provision in Rep. Fino's bill is indeed based on gossamer. Since the failure to act on the provision in 1968 is only of the slightest significance with respect to congressional intent at that time, its bearing on the effort to discern congressional intent six years later, in 1974, is infinitesimally small.

Beyond all this, when Rep Fino introduced his bill with the explicit right of action provision, he included with his speech numerous newspaper articles about the commodities industry. One of these discussed the Great Salad Oil Swindle, and noted that two attorneys for the receiver of Ira Haupt & Co., a brokerage firm which went under in that affair, "are trying to determine whether Haupt can justifiably file suit against the exchange for failure to regulate . . . ." Haupt eventually did, and the court recognized an implied right of action against the exchange, see *Seligson* v. *New York Produce Exchange*, *supra*, 378 F.Supp. 1076. If Congress had given any consideration to Rep. Fino's bill, it could well have failed to enact the explicit remedy provision because it considered this unnecessary in light of the then judicial climate, as had turned out to be the case for Ira Haupt & Co. before the 1974 amendments were passed, see note 17 *supra*. This further illustrates that attempting to attach meaning to the failure of Congress, and even more so of a previous Congress, to enact legislation is a speculative enterprise indeed.

> Transactions in grain futures are utilized by the public for speculation and by the grain trade for the purpose of eliminating or reducing, as far as practicable, the hazards in the merchandising of grain and its products and by-products due to price fluctuations. Public speculation helps to carry the risk for the producers, dealers, and millers who wish to hedge their cash grain transactions. S. Rep. No. 871, 67th Cong., 2d Sess. 3 (1922).

It is true that much of the debate on the floor of the House consisted of vituperative attacks on those "gambling" in the grain trade to the detriment of the producers and the consumer. However, these attacks were generally directed at *big* speculators, i.e., those in a position to manipulate the market, and there was always the recognition that "legitimate trade" was acceptable and indeed beneficial.[22] The emphasis on producers in § 3, the statement of purposes in the 1922 Act, was due to a desire to state a basis clearly within then existing notions of the commerce power rather than to risk invalidation by including classes whom the Supreme Court might not think to come within it; *Wickard* v. *Filburn*, 317 U.S. 111 (1942), then lay twenty years in the future.[23] At that time, moreover,

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22 See, e.g., 62 Cong. Rec. 9404 (June 26, 1922) (Remarks of Chairman Tincher of the House Committee on Agriculture) ("I have never said that the sale of wheat for future delivery should be wiped out . . . but have always said, and I still say, that to let a few gamblers manipulate the grain market was not only unfair to the consumer but unfair to the legitimate trader."); *id.* at 9412 (Remarks of Rep. Voight, a member of the Committee on Agriculture which reported out the bill) ("The bill will reduce gambling but we can not stop it altogether without hurting both consumer and producer").

23 The Court in *Hill* v. *Wallace*, *supra*, had noted that the tax imposed by the 1921 Act applied to sales between members of the

the importance of the speculator in the efficient functioning of the futures market had not yet been so fully recognized by Congress as it has now become.

It is plain in any event that by the time of the 1936 amendments, as was later to be stated in the House Report on the 1978 amendments, "the community protected under federal commodities law was expanded to include speculators." H. R. Rep. No. 95-1181, 95th Cong., 2d Sess. 84 (1978). As described in the 1935 House Report, "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." H. R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935). "Fair practice and honest dealing" are, of course, beneficial not only to farmers but also to legitimate speculators using the market. The concern expressed in the last clause of the quotation, to avoid injury to "the exchanges themselves", certainly encompassed protection for those using the exchanges. This was made clear in a later passage from the same report:

Board of Trade in Chicago. "Looked at in this aspect, and without any limitation of the application of the tax to interstate commerce, or to that which Congress may deem, from evidence before it, to be an obstruction to interstate commerce," the Court could not sustain the Act. 259 U.S. at 68. Congress responded with § 3, precisely focusing on the interstate aspects of futures trading. See 62 Cong. Rec. 9404 (June 26, 1922) (Remarks of Chairman Tincher of the House Committee on Agriculture) ("We have defined interstate commerce, using the language of the Supreme Court, as applying to grains and this law will not apply to any transaction except interstate transactions as defined by the court."); *id.* at 12723 (Sept. 15, 1922) (The Court "called attention to the fact that if grain was in interstate commerce we could reach the situation in this bill; and this bill is strictly following the dictation . . . of the Supreme Court . . .").

"[The bill] simply provides for honesty in the conduct of what are important public markets. This affects vitally the interests of the people, whether they be producers or consumers of the commodities covered by the bill or whether they belong to that class of citizens who have a fondness, and perhaps some aptitude for speculative investment in commodities and who like to test their judgment concerning values and price trends by occasional and moderate speculation therein." *Id.* at 2-3. While the debates in Congress, like those in 1922, did contain many attacks on speculative investors, again there was a recognition of the necessary role of speculators, and the focus of the attacks was on the big manipulator, whose activity was perceived to be detrimental not only to producers and consumers but also to those referred to as "legitimate" traders and dealers.[24] The clearest indication of Congress' concern

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24 Representative Jones, Chairman of the House Committee on Agriculture, stated that the bill was aimed at eight to sixteen traders on the Chicago Board of Trade "who have been largely responsible for the constant fluctuations in the market . . . ." 78 Cong. Rec. 10446 (June 4, 1934). He later stated that the purpose of the bill was "to check manipulation of markets by certain big traders [who] rig the market to the detriment not only of the producer but also of all others engaged in legitimate transactions in various farm commodities." 79 Cong. Rec. 8589 (June 3, 1935). Another Representative considered the bill to be directed against "the speculators who deal in large quantities," 78 Cong. Rec. 10449 (June 4, 1935) (Remarks of Rep. Gilchrist); a third favored it to counter the activities of "15 *or* 20 big grain manipulators," and noted it "will not injure but will beneficially affect legitimate dealers," *id.* at 10451 (Remarks of Rep. Sabath). The Senate debates were to the same effect. The bill was designed to clip the wings of the likes of Arthur Cutten, a big grain manipulator whose activities were considered in some detail. See 80 Cong. Rec. 6160 (April 27, 1936) (Remarks of Sen. Pope). Senator Pope specifically recognized the critical role played by the typical speculator:

> it is the small traders—those who take positions in the market of less than 100,000 bushels—that not only absorb the hedging sales but who furnish the real support for future trading in grains. In

to regulate the large-scale market operator is, of course, the authorization of trading limits in § 4a.

The legislative history of the 1968 amendments continued the recognition of the critical role played by speculative investors and the attack on big or powerful manipulators rather than speculators in general. Both the House and Senate reports explicitly recognized that most futures trading was done by speculators. H. R. Rep. No. 743, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 947, 90th Cong., 2d Sess. (1968), reprinted in 2 U.S. Code Cong. & Admin. News 1675 (1968). The House Report noted that such speculative activity carried with it "the danger that on occasion powerful traders will attempt to influence prices," H. R. Rep. No. 743, *supra*, at 2, but also recognized the necessary role of the legitimate speculator: "This speculative activity provides a means of reducing price risks by persons handling the actual commodity and thus makes possible higher prices to producers and lower prices to consumers." *Id.*

Finally, and most important, the concern to protect the speculator as well as the hedger was clearly evident in the enactment of the 1974 amendments. The House Report noted the large influx of speculators into the commodity futures market as one of the "specific situations mandat[ing] a comprehensive rewrite of futures trading regulation". H. R. Rep. No. 93-975, *supra*, at 39. The beneficial, indeed indispensable, role of such speculators was recognized not only in the House Report, in the language quoted in Part I of this opinion, *id.* at 138, but also in the debate on the floor of

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the main their trading is so diffused and scattered that as a body they lend a stabilizing influence. *Id.* at 6164

the House. Introducing the bill, Chairman Poage of the Committee on Agriculture observed that speculators "provide a very real service to the market and its users, by providing liquidity." 119 Cong. Rec. 41332 (Dec. 13, 1973). Representative Wampler, the ranking minority member of the House Committee and a supporter of the bill, stated that:

> While the speculator has been much maligned to the point where critics of the present marketing system have tried to make "speculator" a dirty word, we must not forget that the speculator performs an important economic function in futures markets. He is, in effect, the risk bearer who assumes the risks which the hedger seeks to avoid. 120 Cong. Rec. 10739 (April 11, 1974).

The debates reveal that one problem prompting the amendments was the catastrophic losses suffered by futures traders, mostly "speculators", who were dealing in commodities not regulated by the old act. See 119 Cong. Rec. 41332 (Dec. 13, 1973) (Remarks of Chairman Poage). In extending regulation to previously unregulated futures markets, the House Report specifically stated that "[t]here is no reason why a person trading in one of the currently unregulated futures markets should not receive the same protection afforded to those trading in the currently regulated markets." H. R. Rep. No. 93-975, *supra*, at 76. In other words, the old act protected those trading in the markets—not merely producers or consumers of the commodity—and the new act would extend this protection of traders to new markets in which even fewer of the traders produced or consumed the actual commodity.

Senate consideration of the 1974 amendments reinforced the views evident in the House. The Senate Report opened with a quotation from Justice Holmes, *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 247-48 (1905), recognizing the virtues of speculation:

> People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. S. Rep. No. 93-1131, *supra*, at iii.

Like the House Report, the Senate Report recognized the role of "the competitive effect of many speculative buyers and sellers in the market" in reducing merchandising price margins. *Id.* at 12. The Senate changed the House bill to provide for an independent CFTC, rather than one under the USDA, since it was concerned that the USDA's historic role as the spokesman for farm interests might affect its policing of commodity markets. See *id.* at 21-22. This clearly evinces a concern to protect those trading on the commodity futures markets, and not simply agricultural producers. Accord, 120 Cong. Rec. 30467 (Sept. 6, 1974) (Remarks of Sen. Taft). Senator Dole considered the purpose of the 1974 amendments to be "to protect any individual who desires to participate in futures market trading," *id.* at 30466, and Chairman Talmadge of the Senate Committee on Agriculture and Forestry wrote that "all of the members of the committee who worked on this legislation had one goal in mind—to develop a strong, but fair regulatory scheme that will protect *investors*,

businessmen and consumers." 120 Cong. Rec. 34996 (Oct. 10, 1974) (emphasis supplied).

It is true, of course, that the CEA was enacted for the benefit of the entire public, as hopefully most regulatory legislation is. But, as is the case with respect to all such legislation, criminal as well as civil, some classes are more in need of protection than others. It is almost self-evident that legislation regulating future trading was for the "especial benefit" of futures traders.[25] Hence it is not surprising that the courts have thus been nearly unanimous in concluding that "speculators", now long recognized to be legitimate investors, as well as hedgers, are within the class for whose especial benefit the CEA was enacted, see especially *Smith* v. *Groover, supra*, 468 F.Supp. at 113; *Gravois* v. *Fairchild, Arabatzis, et al., supra*, CCH Com. Fut. L. Rep. ¶ 20,706. Indeed, even those courts finding no implied right of action under the Act as amended in 1974, including the district court in this case, 470 F.Supp. at 1259, have generally concluded that the first prong of the *Cort* test was satisfied. See, e.g., *Berman* v. *Bache, Halsey, Stuart, Shields, Inc., supra* 467 F.Supp. at 322 ("little question"); cf. *Fischer* v. *Rosenthal & Co., supra* (assuming *arguendo* that plaintiff met the first *Cort* test, "as indeed he may"). More importantly, this court itself is on record to that effect. In *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, supra*, 567 F.2d 1174, where we refused to grant a stay of plaintiff's private damage action and

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25 The securities cases suffice to negate the dissent's suggestion that regulated persons may not also belong to the class for whose special benefit the regulation was enacted. Here Congress made clear that it wished to regulate "bad" speculators for the benefit of good ones, as well as hedgers and simple buyers and sellers.

compel arbitration, the parties having agreed that an implied cause of action existed under the Act, Judge Gurfein wrote that "[w]e have no doubt that the Act itself, *enacted as it was for the protection of investors*, prohibited a surrender of private remedies through an agreement to arbitrate which was not voluntary in the sense that the penalty for refusal was exclusion from the market." *Id.* at 1179 (emphasis supplied).[26] See also *Silverman* v. *CFTC*, 562 F.2d 432, 438 (7 Cir. 1977) ("We must be mindful of a Congressional purpose, clearly evidenced at least since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices") (quoting Moore, J., in *Savage* v. *CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)).[27]

2. We turn now to the second and evidently the most important, see *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575, of the *Cort* factors, "is there any indication of legislative intent, explicit or implicit, either to create such a [private] remedy or to deny one?" 422 U.S. at 78. This inquiry requires an intensive examination of the legislative history of the 1974

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26 While the dissent chooses to characterize this as a "passing reference", it shows the clear understanding of the writer that the Act was enacted to protect speculators and not merely hedgers.

27 The only discordant note on the point that the CEA was intended to protect "speculators" appears to be *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979), a distinct minority view from which the dissent liberally quotes. The commentators have joined the courts' nearly unanimous chorus on this point. See Bromberg & Lowenfels, *supra*, § 462(1) (concluding that "the commodity laws' lack of emphasis on investors is only apparent, not real"); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 826 (1975) ("the statute's clear purpose—to increase existing protection of commodity futures investors").

amendments. We conduct this, of course, with full awareness of the cautions in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976) and *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977), against the dangers of undue reliance on "passing references" by others than the Congressional committees or sponsors or on general statements not directly relevant to the issue at hand.

In our view the legislative history amply demonstrates the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and a desire to preserve them. We are not, as the dissent suggests, "presuming" that Congress was aware of these decisions; the evidence of its awareness is overwhelming.

We begin with the House Report. This noted that when exchange self-regulation first developed, "[V]ery little thought was probably given to whether the failure to meet [stated] ideals would expose the exchanges to legal liability . . . ." H. R. Rep. No. 93-975, *supra*, at 45. The report stated that this view began to change early in the 1920's. "Perhaps the adoption of federal regulatory legislation spurred this total reorientation of the relationship between exchanges and the public. Slowly, the courts began to look upon exchange regulation as a guarantee to the public that its members would not violate its code of conduct." *Id.* In 1968, the report continued, amendments to the CEA required exchanges to enforce their rules, § 5a(8). The existence of private rights of action was thought to have had a perverse effect on the effectiveness of this legislation which the report explicitly noted:

> In the few years this provision has been in the present Commodity Exchange Act, there is grow-

> ing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may have actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants. (emphasis in original).

Later in the Report the Committee noted that one of the specific problems "brought to [its] attention" was the:

> Growing difficulties facing exchanges in self-regulatory actions as a result of *private plaintiffs seeking damages* against the markets. As examples, *exchanges are sued* for actions taken in emergency situations even when the action has been taken at the request (or order) of the CEA. *Id.* at 48 (emphasis supplied).

Nothing in the report, however, indicated dissatisfaction with the private right of action; the objective was to deal with the attendant reduction in exchange rulemaking. This was to be accomplished by empowering the CFTC to require exchanges to adopt rules. § 8a(7).[28]

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[28] The House Report also contained a letter from the Department of Justice to Chairman Poage of the House Committee on Agriculture.

The existence of an implied private right of action was also clearly revealed to Congress in the debate on what became the 1974 amendments. Introducing the bill, Chairman Poage used the language quoted above, which eventually appeared in the House Report, about the change in the legal posture of exchange self-regulation. He then remarked that "when the Commodity Exchange Act was enacted, courts implied a private remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (Dec. 13, 1973).[28a] He went on to note, as would the House report, that as "the judgment of the board of directors of many of the exchanges in implementing decisions under self-regulatory functions is becoming increasingly a justiciable issue," attorneys were advising exchanges to prune out rules they might not be able to enforce in order to avoid the threat of liability in private actions. This threat was described as providing the exchanges with a "solid reason" for retrenching on self-regulatory efforts. *Id.* At the outset of consideration by the whole

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wherein the Department representative twice cited to the recent Supreme Court decision in *Deaktor*, *supra*, 414 U.S. 113. The letter concerned the interrelation between exchange rules and antitrust law, and the author, discussing the doctrine of primary jurisdiction, referred to "situations where the challenged activity is *alleged to violate the Commodity Exchange Act* as well as antitrust laws". H. R. Rep. No. 93-975, *supra*, at 26 (emphasis supplied). *Deaktor* was cited as a case, obviously brought by a private plaintiff, which alleged violations of the CEA. Any legislator who read this should thus have been aware that private individuals could sue exchanges for violations of the CEA; they had done so in *Deaktor*, and the Supreme Court had merely required an initial resort to the regulatory agency for its views where these would be useful.

[28a] The dissent chooses to make a point, footnote 16, that Chairman Poage was in error since the first decision implying a private right of action under the CEA was made in 1967 rather than 1966. We fail to see the significance of this.

House, then, the legislators were informed by the Chairman of the Committee considering the bill that private rights of action were implied under the Act.[29] This was not a mere passing reference, but a critical statement of fact that was a necessary step in explaining why new legislation was needed. The 1974 amendments signaled a dramatic shift from the theory of exchange self-regulation to authorization of the CFTC to compel the exchanges to alter or adopt rules, § 8a(7), and the proponents of the amendments were at pains to explain the need for such a shift. This explanation centered on the existence of an implied private right of action. Amendments were required to force exchanges to adopt beneficial rules because the threat of the judicially implied private right of action had led them to shirk this responsibility. Congress could not have understood why it was changing the underlying theory from exchange self-regulation to compulsory regulation without recognizing that the private rights of action that had been judicially implied under the Act demanded this change. It opted to cure the problem that had developed not by abolishing the private right of action but by empowering the CFTC to require the exchanges to adopt appropriate rules. No amount of labored parsing can obscure the self-evident truth that Congress knew the courts were implying private rights of action and did nothing to alter this. It

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[29] The point was repeated later by Representative Thone, a member of the Committee on Agriculture. See 120 Cong. Rec. 10748 (April 11, 1974) ("Some observers believe that the provision of the 1968 amendments requiring exchanges to enforce their own rules, *thereby implicitly giving private parties the right to sue for nonenforcement*, has had a perverse effect. To avoid risk of litigation, exchange authorities have been encouraged to reduce rather than strengthen rules designed to insure fair trading").

matters little whether this be called recognition or approval.

The House hearings are replete with references to the maintenance of private causes of action under the Act. A representative of various New York commodity exchanges informed the House Committee on Agriculture that the Chicago Board of Trade was at that very moment the target of a $200 million class action,[30] and urged Congress to "take steps to insure that federally regulated exchanges are not exposed to this sort of astronomical civil liability suits . . .". *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture*, 93d Cong., 1st Sess. 121 (1973), something which Congress did not do. Another exchange representative and FCM, discussing the arbitration procedures to be required of contract markets, told the House Committee that "In addition to these arbitration procedures, complainants *of course* have access to the courts." *Hearings on H. R. 11955 Before the House Committee on Agriculture*, 93d Cong., 2d Sess. 249 (1974) (emphasis supplied). A letter sent in the course of the just-cited hearings from Continental Grain Co. indicates that the cases cited in Part IV of this opinion may well have been only the tip of the iceberg—the cases where the private cause of action was challenged and was sustained in a published opinion. The letter calls to the Committee's attention "one recent class action settlement proceeding in court" which required the mailing of 339,000 legal notices and resulted in legal fee claims of over $2,250,000. *Id.* at 321. The

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30 The reference was apparently to *Case & Co., Inc. v. Board of Trade*, *supra*, 523 F.2d 355, see p. 31 *supra*.

letter advocated requiring complainants to choose between arbitration or settlement procedures and resort to courts "which have already held they have jurisdiction over private complaints based on violations of the present law." *Id.*

The existence of a private right of action also was repeatedly indicated during the Senate hearings on the four bills to amend the CEA. *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. (1974). Senator Clark and a commodities law expert, Professor Schotland of Georgetown University, expressed the view that private actions were available under the Act, *id.* at 205, 737, 746. A representative of the Minneapolis Grain Exchange objected to the settlement procedure contemplated for contract markets because the claims which exchanges would be required to adjudicate were not limited by any dollar amount and wished these to be confined to cases where the smallness of the claim entailed an "economic impediment to Court litigation." *Id.* at 415. Such a limit appeared in the bill as enacted, § 5a(11)(ii). The President of the Kansas City Board of Trade urged the Senators to protect exchanges "from unnecessary and costly defenses of lawsuits" brought under the Act. *Id.* at 317. He had made the same request before the House, with similar lack of success. *Hearings on H. R. 11955, supra*, at 123.[31] We shall have more to say about

[31] The dissent relies heavily on a chart introduced during the Senate Hearings, reproduced at footnote 14, to support the conclusion that Congress did not preserve the previously recognized private right of action in 1974. The chart was not prepared by Congress, the relevant Senate Committee, or even a single legislator, but rather by the committee staff. There is no suggestion that in preparing the chart the staff went beyond the explicit provisions of the CEA; the chart

Congress' awareness of the private cause of action and its desire to preserve it when we come to discuss the provision preserving the jurisdiction of the courts. However, what we have developed up to this point is alone sufficient to invoke "the well-recognized canon of construction that the reenactment of a statute incorporates preceding judicial interpretations", *Van Vranken* v. *Helvering*, 115 F.2d 709, 710 (2 Cir. 1940) (L. Hand, J.), *cert. denied*, 313 U.S. 585 (1941)—a canon which, as shown by the *Van Vranken* case, is not limited to interpretations by the Supreme Court. See *Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14 (1930); *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); *Bennett* v. *Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973) (Wyzanski, J.) ("the almost irrebuttable presumption which followed from reenactment with knowledge [of the Fifth Circuit's interpretation of "may" as permissive]"). This canon applies with particular force to the instant case, where the 1974 amendments constituted "the first complete overhaul of the Commodity Exchange Act since its inception," H. R. Rep. No. 93-975, *supra*, at 1, the relevant substantive provisions were left unchanged, and Congress had been made acutely aware of the prior judicial construction that these provisions gave rise to a private cause of action.[32]

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does not purport to deal with the broad subject of civil money "damages", but only with the subject of civil money "penalties". If the chart had attempted to deal with the broader subject of damages, it could have reached only one conclusion, namely, that there was an implied private right of action, since this was the unanimous view of the courts prior to the 1974 amendments.

[32] The dissent argues that none of the pre-1974 cases, with the exception of *Deaktor*, was expressly cited to by Congress and that

The Supreme Court has applied this principle on numerous occasions. In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), Justice Marshall, writing for a unanimous Court, said that when Congress has passed a new statute incorporating sections of a previously construed statute, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change"—even though, as indicated above, the interpretations were by lower federal courts and not by the Supreme Court. It was considered significant that the judicial construction of the previous statute had been unanimous, *id.* at 580-81, as was the judicial implication of private rights of action prior to 1974 in our case. In *Georgia* v. *United States*, 411 U.S. 526, 532-33 (1973), the Court was confronted with a question concerning interpretation of the Voting Rights Act, enacted in 1965 and extended after "extensive deliberations" in 1970, with changes and additions in areas other than the section before the Court. The Court had reached a decision on a related question in the 1969 case of *Allen* v. *State Board of Elections*, 393

Congress' failure to mention *Deaktor* is "highly significant" (p. 43). We fail to see why. As we have developed, there is a plethora of evidence that Congress was well aware in 1974 that courts had consistently implied private rights of action under the CEA. This fact was brought out in the House Report, congressional debate, and hearings before both houses, and was crucial to an understanding of specific aspects of the bill. In light of this it is quite irrelevant that specific case names or citations were not mentioned. In all likelihood this was simply because no one particular case was crucial. *Every* pre-1974 case confronting the question had found an implied right of action without limitation in the opinions to the specific relationships at issue—a result foreordained by the history of decisions under the securities laws—and *Deaktor*, which itself had long been foreshadowed by *Baird* v. *Franklin*, *supra*, 141 F.2d 238, decided nearly thirty years before, thus was not a novelty.

U.S. 544 (1969). Justice Stewart reasoned that "[h]ad Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5." 411 U.S. at 533. A footnote to this quotation indicated that the "repeated discussions" were in Congressional hearings. *Id.* n.5. While we have here no Supreme Court decision of the stature of *Allen* construing the CEA, since the Court's opinion in *Deaktor*, 414 U.S. 113, was not an express holding of the existence of a private cause of action under the CEA, *all* the pre-1974 CEA cases, including the Seventh Circuit's decision under review in *Deaktor*, reached the same result in favor of implication, and decisions sustaining private rights of action were called to the attention of Congress not only in Congressional hearings as in *Georgia* v. *United States* but in the House report and in floor debates.

The presumption just referred to is, of course, rebuttable and appellees insist it has been rebutted by changes made in the CEA in 1974. Before taking these up in detail, we note certain circumstances in addition to those already discussed that require an exceedingly strong showing of an intention to abolish the private cause of action for fraud, manipulation and violations by exchanges that had been universally recognized in order to justify a conclusion that this was Congress' intent. The 1974 Congress repeatedly expressed its view that the changes were designed to *strengthen* commodity futures regulation, a goal that would be ill-served by abolishing the private right of action that everyone had thought to exist. The bill that became the

1974 amendments was described on its face as "an act to amend the Commodity Exchange Act *to strengthen the regulation of futures trading* . . . ." H. R. 13113, 93d Cong., 2d Sess. 1 (1974) (emphasis supplied). The original hearings in the House on the bill were called by the Committee on Agriculture "with a view toward strengthening and revising the existing law." H. R. Rep. No. 93-975, *supra*, at 53-54. The remarks on the floor of the House by the Committee chairman and the ranking minority member repeated this theme. See 120 Cong. Rec. 10736 (April 11, 1974) (Remarks of Rep. Poage) ("to strengthen the regulation of futures trading); *id.* at 10739 (Remarks of Rep. Wampler) ("to inform and strengthen the laws"). The goal in the Senate was the same. See, e.g., S. Rep. No. 93-1131, *supra* at 18 (section entitled "Need for Better and Extended Regulation"). See also *Curran* v. *Merrill Lynch*, *supra*, note 1 at G-8 ("the legislative history of the CFTC Act . . . indicates that Congress intended to extend further protection to the exchange customer, rather than to extinguish existing forms of protection"). Yet the appellees would have us take the forbidden course of ascribing to Congress an intent with respect to private sanctions completely at odds with this clear legislative purpose. See *National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F.2d 672, 690 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (Wright, J.) ("where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers"), and generally Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370 (1947).

In support of this endeavor to rebut the presumption that the 1974 Congress approved the previous interpretation of the CEA, the appellees point to the new reparations procedure of § 14. This authorizes any person complaining of any violation of the Act or any rule, regulation or order by any person registered or required to be so,[33] to apply to the CFTC. If the Commission thinks there are reasonable grounds for investigating the complaint, it shall do so. The Commission may, if in its opinion the facts warrant such action, serve the respondent, who is entitled to a hearing before an Administrative Law Judge except where the amount claimed does not exceed $5,000 in which event the Commission may proceed on the basis of depositions or verified statements of fact. A reparations order is enforceable by suit in a district court. However, this is subject to a right of the respondent to seek a prompt review of the reparations order in a court of appeals.

Quite apart from the provision explicitly preserving judicial remedies which we shall discuss later, the argument that Congress intended this to be the sole private remedy under the CEA is totally unconvincing for several reasons. The first and perhaps the most important reason is the limited scope of the reparations remedy. It is available only against persons who have or should have registered. On appellees' argument, the exchanges which, to the clear knowledge of Congress, had been held subject to private suits before the 1974 amendments, would be wholly relieved of private liability, although Congress failed to heed their

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33 These are FCM's and certain persons associated with a FCM, §§ 4d, 4k; floor brokers, § 4e; and commodity trading advisors and pool operators, § 4m.

repeated pleas for explicitly granting such relief.[34] So too would large unregistered operators, alleged to have committed the most flagrant kind of manipulation, like Simplot and Taggares in the instant case—the very type of persons whose activities had been the subject of particular Congressional concern from the outset. We find it unimaginable that after a half century's devotion to the regulation of futures trading, thirty years of exposure to the liberal implication of private causes of action under the related subject of securities regulation, and knowledge that the courts had consistently applied the same principle to the CEA, the 1974 Congress could have meant that the only federal remedies for persons claiming to have been wronged by such defendants to the extent of millions of dollars should be the small solace of having the Government collect civil fines and enforce administrative or criminal penalties. The dissent cannot paper over this gaping hole by saying, fn. 3, that such operators are not before us. They are defendants, probably the principal defendants, in these actions. While they have understandably chosen to stay in the background in the present argument, acceptance of the dissent's position would compel the district court to dismiss the CEA claims against them. Even with respect to registered persons, the one class of defendants to whom the reparations procedure applies, the remedy hinges upon the Commission's preliminary determination, apparently unreviewable, that the com-

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34 See *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture*, *supra*, at 121; *Hearings on H. R. 11955 Before the House Committee on Agriculture*, *supra*, at 123; *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry*, *supra*, at 317.

plainant has a *prima facie* case, and there is no assurance that this will afford the procedural benefits available in a civil trial. The case differs fundamentally from instances such as *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers (Amtrak)*, 414 U.S. 453 (1974), and *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. 560, where Congress, operating on a *tabula rasa*, provided a new duty and certain express remedies to enforce that duty, and the Court applied the maxim *expressio unius est exclusio alterius*. When as here Congress adds a new remedy to enforce a preexisting duty, where other remedies had been clearly recognized, it would be expected to say so if it meant the new remedy to be exclusive. In fact, as will be seen, it said the opposite. It is just as much "judicial legislation" for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind.

These conclusions are strengthened by the legislative history of the reparations procedure. Chairman Poage, in an apparent reference to the reparations provisions, noted in the House that the Act "sets up new customer protection features." 120 Cong. Rec. 10737 (April 11, 1974). This language suggests that the "new" features are in addition to the "old" ones, and certainly not that they are exclusive. In the Senate, Chairman Talmadge remarked:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the

> right of final determination by the courts are expressly preserved. 120 Cong. Rec. 30459 (Sept. 9, 1974).

The first sentence strongly suggests that Congress did not intend to repeal private rights of action by enacting the reparations procedure, and the second sentence is not to the contrary. If the reparations procedure was intended to be exclusive, then it *certainly* would lighten the burden on the courts, even with review of reparations orders by the courts of appeals. But the Senator spoke in terms of "hope" and lightening the burden "somewhat"—as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts. The second clause relating to judicial review simply noted that even for those who elected reparations there could still be court involvement. Again the House Report describes the reparations procedures as "intended as a separate remedy designed to supplement the informal 'settlement' procedures contemplated of the contract markets and registered futures associations which are required under other sections of the legislation . . . ." H. R. Rep. No. 93-975, *supra*, at 22. These last two types of settlement procedures, however, are expressly made voluntary by the Act. See §§ 5a(11), 17(b)(10). It can therefore be inferred that the reparations remedy is of the same character, and that the aggrieved trader is in no sense compelled to resort to reparations to obtain relief. Commentators have relied on this reasoning, and the savings clause in § 2(a)(1), in concluding that "the victim of a CEA violation is free to ignore the reparations procedure and file a lawsuit." Bromberg & Lowenfels, *supra*, § 461 at 82.362 (1979). The CFTC is

of the same view. See 41 F.R. 3994 (Jan. 27, 1976); *id.* at 18472 n.5 (May 4, 1976).[35]

The argument that the reparations procedure was intended to be the exclusive private remedy is further

[35] The dissent argues, despite all these contrary indications, that the reparations procedure was designed to be the exclusive private remedy beyond informal settlement. In support of this it quotes a letter from Earl Butz, Secretary of Agriculture, published in the House Report, which states that the reparations procedure "should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." The dissent underscores this language, although it is not at all clear what about it suggests that reparations were intended to preclude private actions rather than constitute an additional remedy for aggrieved persons to whom the burden of litigation might be prohibitive. In any event it is irrelevant to our case. The plaintiffs seeking relief before us are not complaining about the handling of their accounts but rather of broad market manipulation. The dissent further stresses a passage from the House Report where it is stated that the Commission "will have original jurisdiction to consider all such complaints" which have not been resolved informally. Again, nothing in this suggests that Commission jurisdiction of reparations proceedings was meant to preclude the jurisdiction of the courts which had been widely recognized. The dissent also relies on the ceiling for civil penalties against exchanges in § 6b of $100,000, arguing that allowing private recovery for "unlimited" damages would be inconsistent with this ceiling. Penalties and damages, however, are quite different in nature. The former are punitive and some limit on the regulator's discretion to impose them is necessary. The latter are remedial and naturally limited to the loss caused by the defendant. Further, the dissent's argument proves too much. There is a limit of $100,000 on the fines which can be imposed on a FCM under § 6(b), but the FCM's are subject to "unlimited" private recovery in reparations. Congress obviously saw no inconsistency between allowing recovery for actual damages and limiting fines. Finally the dissent states that under § 6b fines against exchanges are limited to "an amount which will not 'materially impair the contract markets' ability to carry on its operations and duties.'" P. 47. Rather the CFTC is required to *consider* whether a fine will have this effect; the only ceiling in § 6b is the $100,000 maximum, which, incidentally, is not an "overall" limitation as the dissent states but rather a limit per violation. (For example, each day of failure to comply with a cease and desist order is a separate violation, § 6b). Concern for an FCM's ability to carry on business is specifically required to be considered in § 6(d), yet FCM's are subject to full damages in reparations.

negated and the case for the continuance of the private cause of action is enhanced by the jurisdictional savings clause, § 2(a)(1).[36]

As passed by the House, the exclusive jurisdiction provision read as follows:

> *Provided,* that the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to future delivery . . . *And provided further,* that nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States . . . .

The purpose of this was to separate the functions of the new CFTC from those of the SEC and other regulators. As explained in the House Report, "All commodities trading in futures will be brought within federal regulation under the aegis of the new Commission, however, provision is made for preservation of Securities Exchange Commission jurisdiction in those areas traditionally regulated by it." H. R. Rep. No. 93-975, *supra,* at 3. See generally Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy,* 29 Vand. L. Rev. 1 (1976); Russo & Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission,* 6 Hofstra L. Rev. 57 (1977). The provision was not intended to limit the jurisdiction of

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[36] Plaintiffs do not seek to base their right of action on this jurisdictional provision, but rather point to it as evidencing a congressional concern to preserve existing rights of action. Appellees' criticism, derived from *Touche Ross & Co.* v. *Redington, supra,* 442 U.S. at 577, that plaintiffs' rights must be found in substantive and not jurisdictional provisions, is therefore inapt.

the courts. See *Jones* v. *B. C. Christopher & Co.*, *supra*, 466 F.Supp. at 218-19.

However, there was fear that it would do so and numerous objections were raised to the House provision in the Senate hearings. Admittedly some of these were not primarily concerned with the question of court jurisdiction to hear claims in private actions under the CEA. Chairman Rodino of the House Committee on the Judiciary was concerned that the House provision might be read as pre-empting state courts of their jurisdiction to enforce futures contracts under general commercial law and "to oust even federal courts of jurisdiction". Testifying before the Senate Committee, he suggested an amendment "to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions." *Hearings on S. 2485, S. 2578, S. 2837 and H. R. 13113 Before the Senate Committee on Agriculture and Forestry*, *supra*, at 259-60. While Chairman Rodino's remarks were focused on antitrust jurisdiction, they were not limited to that. He argued generally that federal courts retained jurisdiction, and cited antitrust jurisdiction as an example supporting this view. Other objections to the exclusive jurisdiction provision of the House bill were explicitly addressed to the preservation of private rights of action.[37] Senator Clark noted that treble damages actions, provided in bills which he and Senator McGovern had introduced,

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[37] See also testimony of Deputy Assistant Attorney General Clearwater of the Antitrust Division, *id.* at 663, to which Chairman Talmadge responded: "I have read your statement in its entirety, and I doubt that this committee, and I doubt the House had in mind depriving either Federal courts or [sic] jurisdiction in antitrust matters, *or any other matter*, and certainly not State courts." *Id.* at 664 (emphasis supplied).

were often the most effective enforcement tools.[38] "Unfortunately, the House bill not only does not authorize them but section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate." *Id.* at 205. Professor Schotland did not refer directly to the exclusive jurisdiction provision, but urged rather that the reparations provision, if retained at all, should be accompanied by "explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there." *Id.* at 737, 747.

The upshot of these various objections was the addition by the Senate of the "savings clause", now in § 2(a)(1):

> nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State. S. Rep. No. 93-1131, *supra*, at 54.

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[38] Defendants and the dissent suggest that the failure to enact these bills is evidence of legislative intent to repeal the private right of action. This suggestion is unpersuasive. None of the bills provided a simple private right of action for actual damages. Rather, two of the proposals, H. R. 11195 and S. 2378, would have expanded the previously judicially recognized right of action by providing for treble damages for any violation; and one bill, S. 2837, provided treble damages for a willful violation and actual damages for nonwillful violations. The dissent's argument that it would have been simple to change the bills so as to eliminate the provision for treble damages ignores that trebling was what the proposers wanted. Simple damages were recoverable under existing law. We have not "ignored" the discussion in the *Amtrak* case, 414 U.S. at 461, as the dissent charges, p. 45, where Congress failed to adopt an amendment that would have altered the interpretation which the Secretary of Transportation had placed on the proposed act. It is simply inapposite.

The purpose of this change was stated to be to "make clear that . . . Federal and State courts retain their jurisdiction." *Id.* at 6. The Conference accepted the Senate amendment, with the same stated purpose. S. Rep. No. 93-1194, 93d Cong., 2d Sess. 35 (1974); H.R. Rep. No. 93-1383, 93d Cong., 2d Sess. 35 (1974). The respective chairmen of the House and Senate committees reported that "the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC." 120 Cong. Rec. 34997 (Oct. 10, 1974) (Senator Talmadge); 120 Cong. Rec. 34737 (Oct. 9, 1974) (Representative Poage). When we couple this with Congress' recognition that jurisdiction over private causes of action had been held to have been conferred, the conclusion that Congress desired their continued recognition is nigh irresistible.

Appellees' primary answer to the foregoing discussion is that the pre-1974 cases upholding a private cause of action under the CEA were wrongly decided under the new trend in Supreme Court jurisprudence with respect to implication and that, in consequence, if Congress desired to preserve such a cause of action the savings clause was insufficient and nothing short of express statement would do. This argument might be somewhat impressive if we were dealing with legislation passed by Congress today. But the law here before us was enacted on October 23, 1974 and "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was." *Brown* v. *G.S.A.*, 425 U.S. 820, 828-29 (1976), quoted

with approval by the majority in *Cannon* v. *University of Chicago, supra,* 441 U.S. at 710-11. Here not only did the 1974 Congress perceive the state of the law as allowing implied causes of action under the CEA but its perception was correct. As already developed, the related area of securities regulation was dominated by *J. I. Case Co.* v. *Borak, supra,* 377 U.S. 426, which was cited with approval, subsequent to the 1974 amendments, in *Cort* v. *Ash, supra,* 422 U.S. at 78, and was distinguished but in no way disapproved in *SIPC* v. *Barbour,* 421 U.S. 412, 423-24 (1975). While we of course follow the most recent pronouncements of the Supreme Court, those pronouncements focus our attention on the question of legislative intent, and "our evaluation of congressional action . . . must take into account its contemporary legal context." *Cannon, supra,* 441 U.S. at 698-99.

The sole decision preceding enactment of the 1974 amendments to which appellees point as evidencing the new trend is the *Amtrak* case, 414 U.S. 453, decided on January 9, 1974. Apart from the fact that *Amtrak* was decided when the amendments were well on the road to enactment and there is no evidence that those concerned with the amendments were aware of it, the decision would not in any event have been a warning flag to Congress to make its approval of a private right of action explicit. The clear language of the Amtrak Act and its legislative history manifested an intent to allow suit only by the Attorney General and affected employees, and not by others such as the plaintiff, a passenger association. The Secretary of Transportation had voiced this interpretation during the hearings and, as Justice Stewart reasoned, "it is surely most unlikely that the members of the Committee would have stood

mute if they had disagreed with it." *Id.* at 460. Here the sponsor of the bill in the House expressed his view, both when introducing the bill and in the House Report, that private actions *were* available under the CEA. It is "most unlikely" that the legislators considering the amendments "would have stood mute if they had disagreed with it."

Finally, Justice Stewart emphasized that allowing private suits would be inconsistent with the legislative purpose of the Amtrak Act, since Congress was deeply concerned with paring rail passenger routes efficiently and without time-consuming proceedings. *Id.* at 458. This would have been reason enough not to imply a private cause of action even under *Borak*, 377 U.S. at 432. See also *SIPC* v. *Barbour*, 421 U.S. 412, 418, 421 (1975) (*Amtrak* viewed as case where proposed right of action was inconsistent with legislative purpose). Here there is little dispute that the purposes of the CEA would be effectuated by private actions.

In light of this it is unnecessary to dwell on just how far the recent triad of *Cannon*, *Redington* and *Transamerica* may have gone in limiting the implied cause of action. We do think, however, that the rumors about the death of the implied cause of action which have been circulating in the wake of these decisions—an attitude strongly reflected in the dissent—are exaggerated, at least as far as previously enacted statutes are concerned, and that the effect of the decisions is simply to emphasize that the ultimate touchstone is congressional intent and not judicial notions of what would constitute wise policy. See *Zeffiro* v. *First Pennsylvania Banking and Trust Company* (3 Cir., May 29, 1980) (No. 79-2259) (injured debenture holder can bring implied cause of action under Trust Indenture Act

against indenture trustee who breaches agreement). Two of the decisions themselves recognized implied actions, *Cannon* under Title IX and *Transamerica* under § 215 of the Investment Advisers Act. *Cannon* is strong support for the result we have reached in this case, since the majority opinion recognized the earlier view on implying rights of action and expressly directed courts to consider Congressional action in light of this legal context. Both *Redington*, which found no implied right of action under § 17(a) of the 1934 Securities Exchange Act, and *Transamerica*, which found no implied action for damages under § 206 of the 1940 Investment Advisers Act, considered statutes which were enacted *prior* to the great explosion in judicial recognition of implied rights. Unlike the congressional action in 1974 involved in this case, or that in 1972 involved in *Cannon*, the congressional actions in 1934 and 1940 under review in *Redington* and *Transamerica* were not taken against a background of widespread judicial recognition of implied private causes of action for damages either as a general matter or with respect to the specific subject matter of those statutes. Further, the legislative history on private rights of action in both *Redington* and *Transamerica* was "entirely silent," 442 U.S. at 571-72; 62 L. Ed. 2d at 153—quite unlike the instant case. *Redington* involved a mere reporting provision, as to which there was no history of the implication of private causes of action and which was "flanked by provisions" expressly according such a right, and *Transamerica* turned largely on the express declaration that certain acts should make contracts void, which was taken to grant a right of rescission but not of damages, and the corresponding history of the jurisdictional clause of the Investment Advisers Act.

Far from foreclosing implication of private rights of action, *Transamerica* explicitly noted that the intent to provide such actions "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* at 154.

Even if we were to accept *arguendo* that the *Cannon-Redington-Transamerica* triad would call for affirmance if they had been rendered before the 1974 amendments to the CEA were enacted, the legislative history demonstrates beyond fair doubt that Congress relied on and approved the unanimous course of decisions recognizing private causes of action under the CEA, which in turn, were solidly based on the Supreme Court's decision in *Borak*. Even if that decision were now to be regarded as an aberration, see *Cannon, supra*, 441 U.S. at 735-36 (Powell, J., dissenting); *Redington, supra*, 442 U.S. at 576-77, this affords no basis for thinking that the 1974 Congress had any idea there would be such a drastic change in the Court's thinking.

Appellees also argue that the statutory provisions at issue cannot support a private cause of action because they merely proscribe certain conduct or prescribe duties, rather than explicitly creating rights (§§ 4a, 4b, 5(d), 5a(8)). It is true that the form in which Congress casts a statutory provision may serve as some indicator of the propriety of implication, see *Cannon, supra*, 441 U.S. at 690 n.13; *Transamerica, supra*, 62 L. Ed. 2d at 154, but this is by no means determinative. When, as here, the legislative history and the "circumstances of [a statute's] enactment" evince a clear intent to preserve a private cause of action, the form in which this intent is expressed cannot be permitted to become an obstacle to its realization. The cases do not purport to establish a linguistic test for implication and, in any event, the

securities cases are an exception to the right/duty dichotomy. *Cannon, supra,* 441 U.S. at 690-92 n.13. Even if Congress were aware of the perceived significance of this dichotomy in 1974, which it was not, there would have been no reason for it to suppose that the CEA would not fall under this same exception.

The same considerations refute the claim that a criminal provision such as § 9(b) cannot support a private cause of action. Prior to 1974 courts had implied a cause of action under this provision, see, e.g., *Deaktor, supra,* 479 F.2d at 534, and the Supreme Court had implied such actions from other penal provisions, see, e.g., *Borak, supra.* There was no reason for Congress in 1974 to suppose that this would not continue. In *Cort* v. *Ash, supra,* decided after passage of the 1974 amendments, Justice Brennan declined to imply a private cause of action in favor of a shareholder suing derivatively from a criminal statute prohibiting corporations from making certain specified political contributions. He was careful to note, however, that "provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages," and he refused to "go so far as to say that . . . a bare criminal statute can *never* be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group." 422 U.S. at 79-80 (emphasis in original). He rested the decision on the basis that "the intent to protect corporate shareholders particularly was at best a subsidiary purpose of § 610, and the other relevant factors are all either not helpful or militate against implying a private cause of action." *Id.* In the case of the CEA we have found abundant evidence in the legislative history that the intent to protect traders in

commodity futures was the dominant purpose and the other relevant factors also militate in favor of implying the cause of action. Moreover, the CEA cannot be characterized as a "bare criminal statute". It is replete with civil remedies which involve the courts either directly or on review of CFTC action. See, e.g., § 6(b) (civil fines for, *inter alia*, manipulation); § 6b (cease and desist orders); § 6d (state actions for damages on behalf of residents); § 5b (suspension or revocation of contract market designation); § 14 (reparations). This is not at all a case where a court should be held back from implying a private cause of action because of a legitimate fear that Congress intended only criminal sanctions to apply to certain prohibited conduct.

As previously noted, see note 38, *supra*, appellees and the dissent also argue that no right of action should be implied because Congress did not enact proposals containing explicit rights of action which were before it. Indeed, the dissent repeatedly refers to one house or another of Congress having "rejected" amendments, when it merely failed to act upon them. The effect of such a failure is quite different from the voting down of an amendment, something that the word "rejection" inevitably calls to mind. A house of Congress may have failed to act on an amendment for any number of reasons other than opposition to it—belief that the point was already covered by existing law, see *Diamond Crystal Salt Co.* v. *P. J. Ritter Co.*, 419 F.2d 147, 148 (1 Cir. 1969); *Burlington Truck Lines* v. *Iowa Employment Security Comm'n*, 32 N.W.2d 792, 797 (Iowa 1949); objection to the particular terms and inertia in the way of correction, see note 38 *supra*; or just plain loss in the legislative shuffle. The language of *United States* v. *United Mine Workers*, 330 U.S. 258,

283 (1947), with regard to the failure of the House to enact a bill specifically providing for the injunctive relief there sought by the United States is peculiarly apt—"the fact that the House version did not provide for the issuance of injunctions to aid in the operation of seized plants is not the issue here. Rather it is whether the House expressed any intent to restrict the existing authority of the courts." See also *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 n.11 (1969) (". . . unsuccessful attempts at legislation are not the best guides to legislative intent").[39]

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[39] We find little relevance in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), on which the dissent heavily relies. There Congress had deliberately withheld from the I.C.C. the power to award reparations for past unreasonable motor carrier rates, in sharp contrast to what it had done with regard to rail and water rates. The issue was whether a shipper could circumvent the congressional policy by suit in the courts, although the *Abilene* doctrine, 204 U.S. 426 (1907), would require the courts to refer the issue of reasonableness to the Commission. The Court concluded, although by the narrowest margin, that "It would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I.C.C. to litigate what would ordinarily be the sole controversial issue in the suit", 359 U.S. at 474—although some commission cases and two district court cases which had given only "cursory attention" to the problem had held this might be done. Unlike the 1974 amendments to the CEA, there had been no comprehensive revision of the Motor Carrier Act after consistent judicial interpretation that it did permit reparations suits. The only communication of the Commission's views to Congress was in connection with a request that *it* be given reparations authority, on which Congress had not acted. In our case Congress deliberately left in place a series of eleven thoroughly considered decisions, in line with Supreme Court decisions in a closely related field, stretching out over seven years. Moreover, on the very point that concerned the Supreme Court in *T.I.M.E., Inc.*, namely, that the *Abilene* doctrine would involve the agency in an area where Congress had denied it power and thus circumvent congressional policy, there is no such conflict here. Indeed, the Supreme Court had ruled in *Deaktor* before the 1974 amendments were enacted that in a suit on

Although the Supreme Court has very recently warned in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 48 L.W. 4658, 4662 (1980), quoting from *United States* v. *Price*, 361 U.S. 304, 313 (1960), which, in turn, was quoted in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963), that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," see also the discussion at 48 L.W. 4662 n.13, NYME, the opinion below and the dissent rely heavily on a 1978 amendment adding § 6d, which authorizes state officials to bring suits in federal courts to enjoin violations of the Act and to obtain monetary redress for their residents against violators other than exchanges. NYME asserts that the exception demonstrates a congressional desire that no private actions should exist against exchanges; the dissent takes broader grounds.

In fact, the evolution of § 6d actually supports rather than undermines the implication of a private cause of action against the exchanges. Section 6d was added during the reauthorization of the CFTC pursuant to the sunset provision in the 1974 amendments, 88 Stat. 1391. The period between 1974 and 1978 had seen the rise of widespread fraud off the regulated and supervised contract markets, particularly in the form of commodity options and leverage contracts. The CFTC was severely criticized for its failure to protect investors in this area, and the states were eager to take matters into their own hands and protect their residents. See generally Lower, *State Enforcement of*

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an implied cause of action under the CEA, the court should stay the action pending resort to the agency if this seemed desirable to preserve uniformity.

the Commodity Exchange Act, 27 Emory L. J. 1057 (1978); Young, *A Test of Federal Sunset: Congressional Reauthorization of the CFTC*, 27 Emory L. J. 853 (1978). Some had, see, e.g., *Kelley* v. *Carr*, *supra*, 442 F.Supp. 346 (W.D. Mich. 1977), but others were hamstrung by perceived limitations in the *parens patriae* doctrine. H. R. Rep. No. 95-1181, *supra*, at 14. The addition of § 6d was designed to remove these doubts and to enlist the prosecutorial and enforcement tools of the states to aid the CFTC in correcting abuses primarily off the contract markets. See *id.* at 15 (§ 6d "is intended, among other things, to provide the several states with the power . . . to protect their citizens from persons, such as London options firms, vendors of dealer options and merchants of so-called leverage contracts who perpetuate fraudulent and other practices made unlawful by the Federal law"). See also *Luna* v. *Merrill Lynch*, *supra*, note 1 at 6-8 n.24. Since this concern was largely with off-market abuses, contract markets, clearinghouses, and floor brokers were exempted from the coverage of § 6d. See S. Rep. No. 95-850, 95th Cong., 2d Sess. 25-26 (1978) (activities of these persons "generally of the character of 'pit trading' rather than customer contact"); 124 Cong. Rec. S10561 (July 12, 1978) (Remarks of Sen. Bellmon).

Indeed, the legislative history indicates that the perceived existence of an implied private cause of action against exchanges was actually one of the reasons for their exemption from § 6d. Explaining the exemption, Senator Leahy of the responsible committee noted that:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission

> regulation, institution of Commission enforcement proceedings, and *the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the Commodity Exchange Act.* 124 Cong. Rec. S16527 (Sept. 28, 1978) (emphasis supplied).

Since Congress explicitly relied on judicially implied rights of action in fashioning the exemption in § 6d, that exemption can hardly be cited as evidence of a desire to insulate exchanges from such actions. See also *Smith* v. *Groover, supra,* 468 F.Supp. at 117 ("We fail to see how an apparent congressional unwillingness to *extend* the liability of contract markets suggests an intention to *abolish* such liability altogether").[40]

This analysis is enough to answer NYME's major contention, namely, that the exemption of contract markets from the *parens patriae* actions newly authorized in 1978 is evidence that Congress did not mean them to be subject to private actions of any sort. The dissent adds two broader arguments. The first is that the 1978 amendment offered Congress an

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[40] Requiring states to proceed in federal court and to notify the FCTC does not demonstrate that the 1978 Congress intended to eliminate the private suit for damages which had been recognized by its predecessors four years previously. The states were expected to act largely in an enforcement role, much as did the FCTC; moreover it would be incongruous to allow a state to proceed as *parens patriae* in its own courts for a violation of federal law. Sufficient means to obtain uniformity in private litigation were afforded by the controlling effect of federal law in all CEA litigation and the possibility of referral to the CFTC approved by the Supreme Court in *Deaktor.* Beyond this the dissent's reliance on such a slender reed as the inference to be drawn from the 1978 Congress' having required *parens patriae* suits to be brought in federal courts with prior notice to the CFTC is a prime example of the unreliability—frequently noted by the Supreme Court—of relying on the thinking of a later Congress as a guide to the intentions of a former one.

opportunity expressly to affirm the private right of action in the face of a few district court decisions that this no longer existed in the light of the 1974 legislation and what the dissent calls "the Supreme Court's recent but well-publicized adoption of somewhat stricter principles governing the implication of private causes of action." There are several answers. The first is that in 1978 Congress was concentrating on *parens patriae* suits; it was not considering a general revision of the CEA. "The logic of defendants' argument would be to require federal courts to prohibit private actions with respect to any statute amended in any way after the mid-1970's if Congress did not explicitly create a private right of action." *Navigator Group Funds, supra,* at 16. The second is that while Senator Huddleston cited two district court decisions which had denied a private right of action under the 1974 amendments, these were regarded as "unfortunate" and contrary to the many others he listed that had recognized the continued existence of such actions. 124 Cong. Rec. S. 10537 (July 12, 1978). Indeed the Senator expected additional causes of action to be recognized under other provisions of the CEA in the future, a view that hardly comports with fear of a new restrictive trend in implication jurisprudence. The third is that the asserted new trend in Supreme Court decisions had not yet begun, let alone been "well-publicized". *Cort,* which cited with approval both *Rigsby* and *Borak,* 422 U.S. at 78, merely disallowed a private cause of action in the case *sub judice.* It did not indicate any new trend, and the courts have not so regarded it. As Mr. Justice Powell noted in his *Cannon* dissent of 1979, 441 U.S. at 741, "In the four years since we decided *Cort,* no less than 20 decisions by the Courts of Appeals have

implied private actions from federal statutes." *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977), paid respectful attention to *Borak*, *supra*, 377 U.S. 426, as *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975) had also done, and to *Superintendent of Insurance*, *supra*, 404 U.S. 6. The issue decided adversely to the plaintiffs in these cases was not whether an implied cause of action existed generally but whether the particular plaintiffs came within the protected class. The other cases cited are even less to the point. The first indication of a changed attitude that could be detected by anyone reading the Court's opinions without an exceedingly high powered magnifying glass, not possessed even by the courts of appeals, much less by the Congress, was the 1979 opinion in *Cannon*—and there not in the decision, which was favorable to the plaintiff, but in footnote 6 to Mr. Justice Stevens' opinion, and especially in the dissenting opinion of Mr. Justice Powell.

The dissent argues finally that the express conferring of a right of action upon the states in 1978 shows that Congress thought such action to be necessary before any private cause of action could exist. The assertion is belied by the very passage from the House Report from which the dissent quotes. There was no history of recognition of causes of action by the states on behalf of their residents; indeed the very existence of *parens patriae* actions for other than a state's own financial loss had been called into most serious question by *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 151 (1972). The fact that only express legislation could overcome that decision does not at all suggest that Congress meant to destroy an implied cause of action by victims of proscribed practices which the courts had

upheld since 1967 and Congress had recognized in 1974.[41]

3. Our answer to the second question posed by *Cort* largely determines that to the third, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" Indeed, the question need hardly be asked in a case where, as we have found here, there is abundant evidence that Congress affirmatively intended the private remedy to continue. If Congress clearly thought the remedy to be consistent, it would be of no moment that a court should have doubts about this. Moreover, we have been pointed to nothing that would show how maintenance of suits such as these can impede the functioning of the CEA. If questions should arise in which a court would be aided by consideration by the CFTC, the procedure of a stay pending Commission consideration, which the Court directed in *Deaktor, supra*, 414 U.S. at 115, is available. The Commission sees no inconsistency. To the contrary, it tells us in its *amicus* brief (p. 15) that:

> private damage suits under the Act are consistent and may coexist with the forums expressly provided by Congress for the adjudication of complaints of futures traders—Commission reparation proceedings and contract market arbitration proceedings. The Commission has carefully harmonized these three rights that, in its view, have

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41 The list of CEA protections in the 1978 Senate Report, S. R. No. 95-980, *supra*, at 12-13, which the dissent, note 25, sees as indicative of a congressional belief that no private right of action existed, included only those protections *expressly* provided by the CEA, and is not at all inconsistent with the view, clearly held by the 1974 Congress, that other judicially *implied* protections existed. See *Navigator Group Funds, supra*, at 14-15.

offered a commodity trader an election of remedies since 1974. (footnotes omitted).

The Commission also notes that it "is an agency with limited resources which are insufficient to permit it to police all commodity-related transactions" (p. 34), and that the private damage remedy, in the words of *Cannon*, "is necessary or at least helpful to the accomplishment of the statutory purpose," 441 U.S. at 703. Such expressions by the agency charged with the administration of the statute are entitled to substantial weight. *Cannon, supra*, 441 U.S. 706-08 & n.42.

4. Fortunately, little space needs to be devoted to the fourth *Cort* factor, "is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?", 422 U.S. at 78. The answer is clearly in the negative. The federal government has been vitally concerned with trading in futures since 1922; indeed, the courts have held that § 2(a)(1) of the CEA preempts the application of state law. See *International Trading, Ltd.* v. *Bell*, 262 Ark. 244, 566 S.W.2d 420 (1977); Bromberg & Lowenfels, *supra*, at § 4.6 (471); Johnson, *supra*.

Having answered the first and third *Cort* questions in the affirmative and the fourth in the negative, and having found as to the second that there is ample evidence of legislative intent to preserve a private remedy, we conclude, in accordance with the Sixth Circuit's decision in *Curran* v. *Merrill Lynch*, see note 7 *supra*, that the district court was in error in holding that no private cause of action in damages for violation

of the CEA existed. Since the district court struck all the claims under the CEA, we need not now consider which claims, if any, were within the antifraud provision, § 4b, as distinguished from the antimanipulation provision, § 9(b), relied on as to all defendants; § 4a, relied on as to the conspirators and their brokers; and §§ 5(d) and 5a(8), relied on as to the NYME. Although the other provisions are fairly straightforward and clearly cover the activities alleged in the complaint, § 4b, to put it mildly, is not an easy provision to construe. Commentators have said of it that "While the intent to outlaw fraud is clear from the (A)-(C) subparagraphs, the syntactical mess which precedes them makes it difficult to answer some basic questions about coverage." Bromberg & Lowenfels, *supra*, § 452, at 82.286. Appellees are wrong in saying that § 4b by its terms only prohibits "any person" from defrauding "any other person" in connection with the making of a futures contract for or on behalf of that other person. Thus, if A defrauds broker B, who was making a futures contract for C, A would have defrauded C in connection with a futures contract made for C, although C is not A's customer.[42] The applicability of § 4b may well extend even further, since it could be argued that one trading for his own account makes a contract "for" himself, thus bringing fraud between two principals within the confused language of § 4b. The legislative history of the

[42] The plaintiffs in the consolidated actions before us include both persons who traded through agents, who would be within this example, and persons who traded directly for their own account. *See National Super Spuds, Inc. v. NYME*, 77 F.R.D. 361, 370 (S.D.N.Y. 1977). It is not clear in every case, however, which plaintiffs fall within which group.

provision contains some statements which indicate an intent to protect "customers", see H. R. Rep. No. 1522, 73d Cong., 2d Sess. 5 (1934), although this is never suggested as the limit of coverage, and other statements which suggest a broad construction, see H. R. Rep. No. 1551, 72d Cong., 1st Sess. 1 (1932); 80 Cong. Rec. 6162 (April 27, 1936) (Remarks of Sen. Pope); *id.* at 7853 (May 25, 1936); H. R. Rep. No. 743, 90th Cong., 1st Sess. 3 (1967); S. Rep. No. 947, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 1673, 1678 (1968). When clarification of the section was suggested in 1974, Senator Clark read § 4b as an example of archaic language, but took it as "simply try[ing] to convey the idea that it is unlawful for any person to cheat or defraud another person." *Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 Before the Senate Committee on Agriculture and Forestry, supra,* at 687 (Sen. Clark). Senator Clark was echoing the views of a predecessor considering the section when it was proposed: "[T]he object of the legislation is, or should be, to prevent deceptive or fraudulent transactions. Any language which accomplished that end is worthy of consideration." 80 Cong. Rec. 7871 (May 25, 1936) (Remarks of Sen. Robinson). None of the cases recognizing an implied right of action under § 4b suggest limitation to the broker-customer relation. Their reasoning is broader, and they frequently cite non-§ 4b cases such as *Deaktor.* In *Hirk* v. *Agri-Research Council, Inc., supra,* 561 F.2d at 104, the court suggested that, in line with *Superintendent of Insurance* v. *Bankers Life & Casualty Co., supra,* 404 U.S. at 12, the language of § 4b must be read "flexibly, not technically and restrictively." The dissent is thus seriously mistaken in assuming that § 4b will necessar-

ily be limited to cases coming within its crabbed language. We deem it inadvisable to rule on the applicability of § 4b without the benefit of evidence of the exact relations among the various parties; indeed plaintiffs may find it unnecessary to rely on this section. It is enough for present purposes that the CEA counts stricken from the complaints clearly charged a gross violation of the prohibition of manipulation, § 9(b), of the very type against which Congress had been legislating for half a century.

The order of the District Court is reversed.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that the Commodity Exchange Act (Act), when analyzed according to well-settled principles of construction established by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975); *Cannon v. University of Chicago*, 441 U.S. 667 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S. Ct. 242 (1979), fails completely to reveal any Congressional intent to approve, much less create, an implied private right of action in favor of these plaintiffs-appellants (1) against futures commission merchants and brokers (such as defendants Heinold Commodities Inc., Thompson & McKinnon, Auchincloss, Kohlmeyer Inc., and Clayton Brokerage Co. of St. Louis, Inc.), or (2) against contract exchanges (such as the New York Mercantile Exchange and its officers). On the contrary, Congress expressly provided a pervasive panoply of judicial and administrative means for enforcing compliance with the Act, including civil fines,

compensatory reparations, arbitration, cease and desist orders, and criminal penalties, which may reasonably be viewed as exclusive.

None of the sections of the Act relied upon by appellants (such as §§ 4b, 9(b), 5(d), 5a(8) of the Act, 7 U.S.C. §§ 6b, 13(b), 7(d), 7a(8)) contain any language even remotely suggesting that they were enacted for the "especial" benefit of a particular class of which plaintiffs are members, a primary factor to be considered in determining Congress' intent. *Cort v. Ash, supra*, 422 U.S. at 78. On the contrary, § 4b, of the Act, 7 U.S.C. § 6b, the anti-fraud provision heavily relied on by plaintiffs as supporting their claims against the broker defendants, indicates that it was enacted for the benefit of a discrete class of which plaintiffs are *not* members, namely, customers claiming fraud against brokers with whom they have a broker-customer relationship. Section 9(b) of the Act, 7 U.S.C. § 13(b), a criminal statute also relied on by plaintiffs, reveals that it was enacted for the benefit of the general public, which is insufficient to meet the requirement that a statute creating an implied remedy be for the benefit of a "special class." Section 5 of the Act, upon which plaintiffs rely as the basis for their claim against the New York Mercantile Exchange, is essentially a licensing statute which, among other things, obligates contract markets to comply with certain requirements, including the prevention of price manipulation. It neither grants private rights to members of any class, identifiable or otherwise, nor proscribes any conduct as unlawful.

The legislative history of the Act, which runs into hundreds of pages of Committee reports, testimony and debates, fails to contain one word approving a private

right of action, despite reference by a couple of witnesses and a senator to the subject. On the contrary, in 1974 Congress failed, after exhaustive hearings, to enact any one of several bills which would have expressly provided a private right of action for violations of the Act, S. 2837, 93d Cong., 2d Sess. § 505(a) (1974) (Hart bill) and S. 2378, § 16 (McGovern bill). In 1968 Congress had rejected a bill which would have made *contract markets* liable to aggrieved persons for violations of the Act, H.R. 9178, 90th Cong., 1st Sess. § 32 (1967). Moreover, the enactment of a reparations procedure whereby any person injured by a violation of the Act can recover compensatory damages, § 14, and its legislative history, shows not only that "Congress knew how to confer a private right of action when it wished to do so," *Transamerica, supra*, 100 S. Ct. at 248 n.13, but that Congress viewed the reparations procedure, along with the other expressly provided remedies, as sufficient to protect those aggrieved by violations of the Act. H.R. Rep. No. 975, 93d Cong., 2d Sess. 22, 83 (1974). In this respect the Act differs sharply from the Securities Exchange Act of 1934, 78 U.S.C. §§ 78, *et seq.*, relied upon by the majority, which does not provide for any administrative proceeding to recover damages.

Faced with this persuasive evidence against any intent to create or approve a private right of action, the majority relies on the fact that prior to the 1974 revision of the Act various lower federal courts, using the now-outmoded "tort theory" for implying a private right, had implied such rights under the Act as it then existed and contends that against this background (of which Congress is presumed by the majority to be aware) congressional silence in 1974 must be inter-

preted as congressional approval. I disagree. Congress is not under any duty to state that the various remedies provided by it are exclusive, much less to disavow or disassociate itself from prior lower court decisions as if they were statutes enacted by it. *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1958). The Supreme Court had never found implied rights under the Act. Virtually all of the lower federal court decisions, moreover, are irrelevant for the reason that they deal with rights of *customers* against their broker-dealers under § 4b, 7 U.S.C. § 6b, not suits by speculators such as plaintiffs against brokers with whom they have no relationship.

Only one pre-1974 decision, *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *reversed on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), decided less than one year before the 1974 revision of the Act, implied a private right in favor of a trader against an exchange. Neither this nor any other of the pre-1974 decisions relied on by the majority was ever cited to or discussed by Congress.[1] To presume under these circumstances that Congress was aware of and approved these prior cases is to substitute sheer speculation for hard evidence of intent.

In addition the majority errs in my view by presuming that Congress assumed that a private right

1 Although the Department of Justice in a letter to the House Committee, dated January 30, 1974, H.R. Rep. 93-975, *supra*, at 25, 26, briefly cited the Supreme Court's decision in *Deaktor*, the Department cited the case not for the proposition that private rights of action exist under the Act—indeed the Supreme Court's decision did not even address private rights of action—but rather for the totally different purpose of persuading Congress not to enact a blanket antitrust exemption for the exchanges. There is nothing in the legislative history suggesting that Congress was aware that the lower court in *Deaktor* had implied a private right of action under the Act.

may be implied in the absence of a Congressional statement of the opposite intent. On the contrary, the burden is on appellants to show an affirmative Congressional intent to favor an implied private right. Lacking any affirmative evidence of such approval, either on the face of the Act or in its legislative history, plaintiffs have failed to sustain that burden.

PRINCIPLES OF STATUTORY CONSTRUCTION TO BE APPLIED IN DETERMINING WHETHER IMPLIED PRIVATE RIGHT OF ACTION EXISTS

As the Supreme Court has recently made clear, *Transamerica, supra,* 100 S. Ct. at 245; *Redington, supra,* 442 U.S. at 568; *Cannon, supra,* 441 U.S. at 688, the question of whether a statute impliedly creates a private right of action is one of statutory construction requiring us to determine whether the plaintiff has sustained the burden of showing that Congress had an unexpressed intent in favor of such a remedy. See *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 419 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974) (hereinafter *Amtrak*); *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 182 (1966), *cert. denied,* 385 U.S. 317 (1966) (Friendly, C.J.). Absent evidence of clear intent, judicial creation of a private remedy amounts to an assumption or usurpation of the legislative function in violation of the separation of powers doctrine. *Cannon, supra,* 441 U.S. 743-47 (Powell, J., dissenting).

In construing a statute to ascertain Congress' intent "the court is to apply the law in effect at the time it renders its decision, unless doing so would result in

manifest injustice or there is statutory direction or legislative history to the contrary," *Cort v. Ash, supra*, 422 U.S. at 77 (quoting from *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974)). Although the utility of a private remedy in achieving the apparent goal of legislation is a factor to be considered in seeking to divine Congress' intent and was at one time the dominant factor, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 436 (1964), it has been relegated to a lesser position by a series of decisions beginning with *Cort v. Ash, supra*. We are now instructed to look principally to the language and structure of the statute at issue in light of the circumstances surrounding its enactment rather than engage in judicial legislation supported only by our own view that a private suit would be a salutary enforcement weapon. As Mr. Justice Frankfurter has reminded us, "We must be wary against interpolating our notions of policy in the interstices of legislative provisions," *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942).

> "As our recent cases—particularly *Cort v. Ash*, 422 U.S. 66—demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent." [Footnote omitted.] *Cannon, supra*, 441 U.S. at 688.

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> "While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g.*, *J.I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington, supra,* at [568]; *Cannon v. University of Chicago, supra,* at [688]. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us." *Transamerica, supra,* 100 S. Ct. at 245.

If the language and structure of the statute clearly demonstrate Congress' intent, we need go no further. If not, we must attempt to fathom Congress' intent by applying the factors set forth in *Cort v. Ash.* The first of these is whether the statute indicates that it was enacted for the "especial" benefit of a particular identifiable class of which the plaintiff is a member. We may not, however, infer an intent to create a private remedy merely from Congress' expressed desire to benefit the public generally or even to benefit everyone engaged in an entire industry or line of commerce. As the Court stated in *Cannon, supra,* 441 U.S. at 690:

> "The language in these statutes—which expressly identified the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra,* and other laws enacted for the protection of the general public.[13]"

Footnote 13 reads in relevant part:

> "Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See *Piper v. Chris-Craft Industries*, 430 U.S. 1 ('unlawful' conduct); *Cort v. Ash, supra* ('unlawful' conduct); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (duty of SIPC to 'discharge obligations'); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (forbidding 'action, practice, or policy inconsistent' with the Amtrak Act); *Wheedlin v. Wheeler*, 373 U.S. 647 (setting procedure for procuring congressional subpoena); *T.I.M.E. Inc. v. United States*, 357 U.S. 464 ('duty of every common carrier . . . to establish . . . just and reasonable rates . . . .'); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (similar duty of gas pipeline companies)."

The term "especial" benefit refers to a specific, definable class, described by the Court in *Cannon* as "a special class of which the plaintiff is a member," 441 U.S. at 689. The broader that class, the weaker is any implication of intent to provide its members with a private remedy. Otherwise the "special class" would embrace everyone.

Thus, we must carefully search the language of the statutory provisions under consideration for any expression of intent to benefit a specific group, as distinguished from an intent to benefit an entire industry, line of commerce or the public at large. Absent such expression, the possibility that Congress

intended to provide a private remedy is so slim as to be virtually non-existent.

Assuming that the statute on its face evidences a desire to benefit a special class of which plaintiff is a member, we must next examine the statute as a whole and such relevant circumstances surrounding its enactment as may shed light on Congress' intent with respect to remedies. An important consideration in this search is whether and to what extent that statute expressly provides remedies other than a private right of action for its enforcement. The failure to provide any remedies is obviously not helpful to a private plaintiff, since "implying a private right on the basis of congressional silence is a hazardous enterprise, at best," *Redington, supra*, 442 U.S. at 571. But this is not dispositive, since "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make a private remedy available," *Transamerica, supra*, 100 S. Ct. at 246. On the other hand, if the statute *does* contain other provisions for its enforcement, such as judicial or administrative remedies, which would secure most if not all of the relief sought in the private action, a private remedy will not ordinarily be implied. The Court has recently reiterated the principle of statutory construction in *Kissinger v. Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223, 4226 (March 4, 1980), and in *Transamerica, supra*.

> "Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular

> mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). See *Amtrak*, *supra*, 414 U.S. at 458; *Securities Protection Investment Corp. v. Barbour*, 421 U.S. 412, 419; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471." *Transamerica*, *supra*, 100 S. Ct. at 247.

It is reasonably clear that the broader the scope and type of the expressly-provided remedies, the less is the need or justification for implying an unmentioned additional private remedy. In such circumstances it is highly unlikely that "Congress absentmindedly forgot to mention an intended private action." *Transamerica*, *supra*, 100 S. Ct. at 247 (quoting *Cannon*, *supra*, 441 U.S. at 742).

Next in our search for legislative intent we look to the legislative history of the statute. The most reliable and persuasive indicia of congressional intent, of course, are Senate and House Committee Reports. *United States v. International Union (UAW-CIO)*, 352 U.S. 567, 585-86 (1957); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *International Tel. & Tel. Corp. v. General Tel. and Electronics Corp.*, 518 F.2d 913, 921 (9th Cir. 1975); *American Airlines, Inc. v. CAB*, 365 F.2d 939, 949 (D.C. 1966).

Absent definitive statements on the issue of private remedy by those solons vested with primary responsibility for the statute, certain surrounding relevant circumstances may shed light on Congress' intent as to remedies, such as its consideration and/or rejection of an express private remedy, its statements of understanding as to the necessity or lack of it for such a

provision, whether an implied remedy is consistent with the statute's underlying purposes and with any other enforcement measures expressly provided by it, and whether the private remedy is one traditionally relegated to other tribunals, such as administrative bodies or state courts. Most of these other circumstances, however, while of some relevance, usually offer but a weak reed upon which to rest a determination of Congress' intent. There comes a point where legislative history becomes so will-o'-the-wisp or far-fetched with respect to the matter in issue that we run the danger of attributing to Congress thoughts it never actually had. "The search for significance in the silence of Congress is too often the pursuit of a mirage," *Scripps-Howard Radio v. FCC, supra,* 316 U.S. at 11. This ethereal process is particularly illusory, stultifying and unrealistic where, as here, we may reasonably expect, because the issue of a private damage remedy is so important that, had Congress approved or acquiesced in a private right of action, it would have said so somewhere in the thousands of pages of legislative history on the Act.

For these reasons, where it is claimed that Congress has created the significant and potentially devastating remedy of a private action for damages, under which liability could amount to hundreds of millions of dollars, primary weight should be placed on the language of the statute and on clear, unequivocal statements by those responsible for its enactment. As the Supreme Court has recently emphasized, "absent a clearly expressed legislative intention to the contrary," the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 48 U.S.L.W. 4658, 4659 (June 9, 1980). Extrapolations based on gossamer-

thin fabric, requiring speculative assumptions as to Congress' intent are to be avoided. To rely upon such weak inferences is to indulge in judicial legislation. If, as the majority states (footnote 17) was the case with the 1974 amendments to the Commodity Exchange Act, Congress makes a *"complete overhaul"* of a statute, expressly creating other remedies, it is reasonable to expect that it will indicate any intent to create such an important right as that to bring a private suit by an express grant, which would take but one sentence, rather than by silence.

A GENERAL OVERVIEW OF THE COMMODITIES EXCHANGE ACT

Before turning to the specific language of the Commodity Exchange Act, 7 U.S.C. §§ 1, *et seq.*, relied upon by appellants as the basis for their claim of implied private rights of action against (1) future commission merchants and brokers, §§ 4b, 9(b), 7 U.S.C. §§ 6b, 13(b), and (2) exchanges or contract markets, §§ 5(d), 5a(8), 7 U.S.C. §§ 7(d), 7a(8), a brief overview of the Act is helpful. Trading in commodity futures has dramatically increased over the last half-century, giving rise to problems of public importance, such as the dangers of price manipulation, cornering of markets and fraud by broker-dealers upon their customers. As these problems increased, more stringent public supervision and control of markets and brokers became necessary. From 1922, when Congress enacted the Grain Futures Act to give the Secretary of Agriculture supervisory power over grain exchanges, until 1974, when the Commodity Futures Trading Commission Act was enacted, creating a new indepen-

dent agency, the Commodity Futures Trading Commission (CFTC) with plenary and exclusive authority over both futures markets and traders on those markets. Congress has gradually increased public control to the point where we now have an elaborate regulatory scheme designed to assure the public of honest and orderly futures trading, and to prevent price manipulation, fraud and sudden or unreasonable price fluctuations in commodity prices.

This extensive all-embracing system was described by House and Senate Reports as intended to create a "uniform," "comprehensive," "complete" and "coherent" regulatory structure. H.R. Rep. No. 93-975, *supra*, at 1; S. Rep. No. 850, 95th Cong., 2d Sess. 10, 13 (1978). The Act authorizes a wide variety of control mechanisms, including the licensing of contract exchanges and trading personnel, and a full panoply of enforcement powers, both administrative and judicial, including procedures for the award of damages in reparations proceedings, arbitration, imposition of civil fines of up to $100,000 for violations, issuance of cease and desist orders with fines of up to $100,000 per day for noncompliance, conduct of investigations with power to compel attendance of witnesses and production of documents, revocation of an exchange's designation, suspension of members of exchanges from trading privileges, institution of proceedings in federal court to compel compliance with orders or to enjoin violations of the Act, and the assessment of criminal penalties for violations of the Act and price manipulation, felonies punishable by a fine of not more than $500,000 or imprisonment up to five years, or both.

Provisions for Regulation of Contract Exchanges

Under the Act the CFTC is vested with exclusive power to designate contract exchanges for trading in particular commodities, § 5 of Act, 7 U.S.C. § 7. Futures contracts may lawfully be traded only on such "contract markets" as are designated for the commodity traded, §§ 4 and 4h of the Act, 7 U.S.C. § 6 and 6h. In order to be so designated as a contract market and to continue to conduct business as such, an exchange must meet rigid requirements, including the adoption of procedures for the prevention of price manipulation. § 5(d) of the Act, 7 U.S.C. § 7(d). Section 5a of the Act places additional requirements on a contract market, including the requirement that it enforce all of its rules that have been approved by the CFTC. § 5a(8) of the Act, 7 U.S.C. § 7a(8). The CFTC may disapprove rules violative of the Act or of its regulations and compel exchanges to adopt additional rules, § 8a(7) of Act, 7 U.S.C. § 12a(7).

If a contract market violates the Act or the conditions of its designation the CFTC is empowered to suspend or revoke its designation, § 5b, § 6(a) of Act, 7 U.S.C. § 7b, § 8. In addition it may conduct such investigations as it deems necessary to ascertain the facts, § 8 of Act, 7 U.S.C. § 12(a), issuing such compulsory process as is needed for production of witnesses and documents, § 6(b) of Act, 7 U.S.C. § 15. The CFTC is authorized to issue its own cease and desist orders against exchanges found after hearing to be violating the Act or any regulations thereunder, and assess civil penalties of up to $100,000 for each violation, § 6b of Act, 7 U.S.C. § 13a. Refusal to comply with a CFTC cease and desist order is a misdemeanor punishable by fine of up to

$100,000 or imprisonment of not less than 6 months nor more than one year, or both, for each day of noncompliance. *Id.* The CFTC may seek federal relief against violation of the Act or regulations by anyone, including an injunction or restraining order to stop existing or threatened violations or a writ of mandamus compelling an exchange to comply. § 6c of Act, 7 U.S.C. § 13a-1. It may also direct contract markets to take emergency action to maintain an orderly market. § 8a(9) of the Act, 7 U.S.C. § 12a(9). Exchanges are also subject to criminal penalties for violations of the Act or price manipulation, felonies punishable by a maximum fine of $500,000 and prison term of 5 years. § 9(b) of Act, 7 U.S.C. § 13(b).

Provisions for Regulation of Futures Commission Merchants

The CFTC has equally awesome and pervasive powers over brokers and futures commission merchants (FCMs). It establishes requirements for registration of brokers as futures commission merchants, §§ 4d, 4f, 4g, 4k, 4p, 8a, of Act, 7 U.S.C. §§ 6d, 6f, 6g, 6k, 6p, 12a Two substantive provisions of the Act are particularly relevant here. Section 4a authorizes the CFTC to fix quantitative limits on speculative trading, 7 U.S.C. § 6a, and by regulation the CFTC has fixed limits on short trading. 17 C.F.R. § 150.10. Section 4b prohibits any members of any exchange from defrauding his customer in connection with a sale. 7 U.S.C. § 6b.

The CFTC is authorized to deny trading privileges to any person violating the Act or attempting to manipulate commodity prices and may suspend or revoke the registration of a futures commission

merchant for violations. § 6(b) of Act, 7 U.S.C. § 9. It may also suspend, expel or otherwise discipline any exchange member or deny him access to the exchange, § 8c(1) of Act, 7 U.S.C. § 12c(1), including aiders and abettors, § 13 of Act, 7 U.S.C. § 13c, and review, affirm, reverse or modify an exchange's discipline of its own members, § 8c(3) of Act, 7 U.S.C. § 12c(3). Violations of the Act and commodity price manipulation are felonies punishable by a maximum term of up to 5 years imprisonment or a fine of not more than $500,000, § 9(b) of Act, 7 U.S.C. § 13(b). In addition, the CFTC may issue cease and desist orders against a broker engaged in or attempting price manipulation, § 6(c) of Act, 7 U.S.C. § 13b. Non-compliance constitutes a misdemeanor punishable by a fine of up to $100,000, imprisonment of not less than 6 months nor more than 1 year, or both, for each day of refusal to obey. *Id.* The CFTC may also, as with exchanges, seek mandamus and injunctive relief in the federal courts, § 6c of Act, 7 U.S.C. § 13a-1.

Provisions for Compensation of Persons Injured by Violations

The Act also provides detailed procedures designed to compensate persons damaged by violations of the Act. Contract markets are required to provide voluntary arbitration procedures for settlement of customers' complaints up to $15,000 against any member or employee, § 5a(11) of Act, 7 U.S.C. § 7a(11). This, of course, contemplates a swift, inexpensive method of resolving smaller claims.

A much more comprehensive and complete compensatory remedy available to those with large claims is

provided by § 14 of the Act, 7 U.S.C. § 18. Section 14 provides for the institution of an administrative "reparations" proceeding by "any person" (which includes plaintiffs here) against any person registered under §§ 6d, 6e, 6j and 6m of the Act, including a futures commission merchant, for damages caused by a violation of any provision of the Act or any rule, regulation or order thereunder. The CFTC is required first to review the facts set forth in the petition and, if it believes these warrant action, it must forward a copy of the complaint to the respondent for satisfaction or response. If the CFTC after hearing finds that the registered merchant or broker has violated the Act it must determine the amount of the damage and order the offender to pay the amount to the complainant. If its order is not satisfied the CFTC may seek enforcement in the federal district court where the complainant resides, which is expressly empowered to issue orders, writs and process anywhere in the United States. The respondent against whom the Commission has issued a reparations order may obtain review by a United States Court of Appeals upon posting of a bond in double the amount of the reparations awarded.

Unless the registrant against whom a CFTC reparations order has been issued shows within 15 days thereafter that he has satisfied the order or taken an appeal to a federal court of appeals, which is authorized to review the order, the Commission must prohibit him from trading on all contract markets and his registration is automatically suspended, § 18(f), 7 U.S.C. § 14(f). The Act thus provides an efficient and inexpensive method whereby any injured person may obtain compensatory damages in an unlimited amount against a broker for violations of the Act, thus avoiding

much of the expense and delay involved in costly court actions, which necessitate extended use of scarce judicial resources.

Applicability to the Present Case

The complaints in the present action, to the extent that they seek relief based on violations of the Act against the three broker-defendants registered as futures commission merchants with the CFTC (Heinold Commodities Inc., Clayton Brokerage Co. of St. Louis, Inc., and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc.) pursuant to § 4d of the Act, 7 U.S.C. § 6d, are completely remediable under the express provisions of the Act itself. In addition the CFTC may conduct, and as to some short sellers and agents of certain brokers in this case has conducted, investigations leading to imposition of sanctions, including heavy fines and prohibitions against trading on a designated contract markets.[2]

To the extent that appellants seek relief against the designated contract exchange defendants (New York Mercantile Exchange and its officers) based on violations of the Act, the reparations procedure provided by § 14 of the Act is not made available. This omission,

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2 As a result of the CFTC investigation, Simplot and his various companies entered a consent decree pursuant to which they were assessed a fine of $90,000, and prohibited from trading futures contracts for six years. Similarly, Taggares and his companies entered into a consent decree pursuant to which they were assessed a fine of $15,000 and prohibited from trading futures contracts for four years. CFTC investigations against various long traders and certain agents of brokers are still pending. Although the CFTC has not conducted an investigation of the defendant brokers here, the Clearing House Committee of the Exchange assessed heavy penalties against defendant Clayton for its failure to comply with Exchange Rule § 44.02, which requires members of the exchange who are not in a position to make delivery of a commodity to enter a liquidating order not later than five minutes before the closing of trading.

however, does not appear to have been an oversight, but rather a move deliberately designed to protect exchanges against ruinous damage recoveries which might seriously weaken them or drive them out of business. The existing administrative remedies, including the broad disciplinary action that the CFTC was authorized to employ, coupled with its power under § 6b to impose a fine of up to $100,000 on an exchange for each offense, were sufficient to remedy non-compliance by an exchange with the Act's stringent requirements.[3]

Thus the Act, far from being silent on the subject of remedies for its enforcement, provides a series of specific remedies, including administrative reparations in prescribed circumstances, enforceable through and reviewable by federal courts. This tends to negate the inference that Congress intended implied private rights of action to exist after its complete overhaul of the Act in 1974 and simply forgot to mention this remedy. The structure of the Act itself, therefore, affords no assistance to the plaintiffs but on the contrary supports the dismissal of their claims.[4]

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3 Here the CFTC administrative proceeding against the New York Mercantile Exchange resulted in a consent decree and a $50,000 civil penalty.

As for defendants Simplot and Taggares, the majority claims (opinion, p. 49) that it is "unimaginable" that Congress could have intended to relieve such defendants from large civil liability. The majority misses the point. Whether a private right of action exists against such purchaser-speculators as Simplot and Taggares is not at issue in this case. More significantly, it escapes me how the majority can claim that we are somehow "withdrawing" a pre-existing private right of action against defendants like Simplot and Taggares, in light of the fact that *no case* has ever held that a private right of action exists in favor of one speculator against a purchaser-speculator. There is simply no remedy for us to "withdraw."

4 As administrative agencies for obvious reasons are wont to do, the CFTC here contends that the implication of private rights of action

THE SPECIFIC PROVISIONS OF THE ACT RELIED UPON BY THE APPELLANTS

(1) *Sections relied on to support claims against the registered futures commission merchants.* (§ 4b, 9(b), 7 U.S.C. §§ 6b, 13 (b))

The plain language of § 4b, 7 U.S.C. § 6b, upon which plaintiffs mainly rely as authority for their private action against the broker-defendants, shows that it does not refer to the obligations of broker-dealers toward third parties, such as the plaintiffs here, but to their obligations toward their own customers. Plaintiffs, who

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is necessary to effectuate the purposes of the statute and claims that its views on the matter are entitled to considerable deference. The Supreme Court, however, has consistently rejected such claims. In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1976), the Court stated with respect to the SEC's position on the need for private rights of action that the SEC's "presumed 'expertise' in the securities law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in the particular case. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)."

Moreover, the Supreme Court has significantly rejected the implication of a private right of action, despite the urgings of the relevant administrative agency, in such cases as *Transamerica, supra*, 100 S. Ct. 242; *Redington, supra*, 422 U.S. 560; *Piper, supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738 (1974); *T.I.M.E. Inc. v. United States, supra*, 359 U.S. 464. Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of the statute, as revealed by its language, purpose and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters v. Daniel*, 439 U.S. 551, 556 n.20 (1979)).

are speculators in the futures market, are not claiming fraud on the part of broker-dealers who handled their accounts but fraud on the part of other brokers with whom they had no relationship who allegedly participated in a conspiracy with short sellers and others to artificially depress the price of May 1976 potato futures through manipulation and excessive short sales in violation of the Act.

Section 4b reads in pertinent part:

> *"It shall be unlawful (1) for any member of a contract market* . . . in or in connection with *any order* . . . *for or on behalf of any other person*, or (2) *for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery* . . . *for or on behalf of any other person*. . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud *such other person;*
>
> (B) willfully to make or cause to be made to *such other person* any false report or statement thereof, or willfully to enter or cause to be entered for *such person* any false record thereof;
>
> (C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for *such person*." (Emphasis added.)

Only the person on whose "behalf" a contract is made by a member is protected by § 4b from the fraud and deceit on the part of that member in the making of a

futures contract. The "person" is the customer for whom the futures contract is made. The introductory paragraph defines the subject matter of the action in terms of a "contract of sale . . . for or on behalf of any other person." Subsections (A), (B) and (C) then limit the prohibited activities to certain forms of fraud by the broker upon "such other person" (i.e., his customer). The offense, therefore, exists only when a member cheats or defrauds *his own customer.*

Nowhere does § 4b mention parties having no connection to the contract. Nor, despite the majority's effort to strain a broader coverage out of the section's language, is there any indication that Congress intended to create the massive liability that would result if broker-dealers were made liable to every trader active in the market at a given time. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 n.5 (1975) ("The wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large" (emphasis in original)). The express mention of customers only as beneficiaries, just like the mention of purchasers and sellers in *Blue Chip Stamps*, negates any intent to include anyone else.

There is no support in the legislative history for the majority's broad reading of § 4b. To the contrary, language in relevant House Reports indicates just the opposite. The 1934 House Report on what was to become § 4b states:

> "Section 4b prohibits traders in acting *for customers in futures transactions to cheat, defraud, or deceive customers*, or to bucket or offset such

> orders against orders for others." H. R. Rep. No. 1637, 73d Cong., 2d Sess. 5 (1934). (Emphasis added).

The 1935 House Report confirms that interpretation:

> "Section 4b makes it unlawful for members of contract markets, and correspondents, agents, and employees thereof, in connection with orders to make or the making of contracts of sale of any commodity in interstate commerce to cheat, defraud, or deceive *the customer*, or to bucket the order." H. R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). (Emphasis added).

The legislative history of the 1968 amendments also refutes the majority's contention. Speaking in support of legislation to amend § 4b, Representative Hathaway introduced the testimony of Assistant Secretary of Agriculture Mehrens, who had testified before the House Committee on Agriculture, stating in part: "We ask that this provision [§ 4b] be expanded to cover all persons who handle *customer* orders or funds. . . . The proposed legislation . . . would . . . give *customers* who deal in commodity futures with nonmembers the full protection of the Act." 113 Cong. Rec. 23651 (Aug. 22, 1967). See S. Rep. No. 947, 90th Cong., 2d Sess. 6 (1968). There was no indication that non-customers, such as plaintiffs here, were entitled to invoke the section against third parties who were not their brokers or fiduciaries. See in accord, *Chipser v. Kohmeyer & Co.*, 600 F.2d 1061, 1065 (5th Cir. 1979) ("Section 4b makes it unlawful for a commodities broker to 'cheat or defraud' a *customer* or willfully deceive or make false statements or reports to a *customer* in connection with

transactions on the commodities exchange." (Emphasis added)).

Aside from the fact that § 4b is limited to protection of customers against fraud on the part of broker-dealers acting on their behalf, there is nothing in the section indicating that Congress intended to provide even these customers, much less others such as appellants, with a private civil remedy against broker-dealers. The Supreme Court has repeatedly stated that before a private right of action will be implied it must be shown to be "necessary" to effectuate Congress' purpose. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (private right of action not necessary since plaintiffs had an alternative remedy); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 (1977); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977). Here a private remedy would not be necessary to enforcement of § 4b, since the existing administrative procedures provided by the Act, including the award of reparations, amply protect the customer. The creation of an implied private judicial remedy would not only be unnecessary but would run counter to Congress' established remedies, since the customer could hardly seek damages in a civil court action without waiving his right to recover the same damages in a reparations proceeding. A private right would therefore be duplicative.

Nor does the language of § 9(b) of the Act, 7 U.S.C. § 13(b),[5] the other section of the Act relied on by

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[5] Section 9(b) reads:

"(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner

plaintiffs, sustain a private right of action here. It is a criminal statute to be enforced by criminal penalties, as was specifically recognized by Congress when it amended the provision in 1936. H.R. Rep. No. 421, 74th Cong., 2d Sess. 9 (1935). There is no language in § 9(b) even remotely suggesting that it was enacted for the "especial" benefit of a special class of which plantiffs are members. Indeed, the statute makes no reference to any beneficiaries at all. Like § 206 of the Investment Advisors Act construed in *Transamerica, supra*, it "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." 100 S. Ct. at 247. To spell a private right of action out of such a general criminal statute would permit anyone who claimed to have been injured by a violation of the Act to sue, regardless of Congress' intent. The Supreme Court "has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large," *Cannon, supra*, 441 U.S. at 692 n.13; *Cort v. Ash, supra*, 422 U.S. at 79-80 (18 U.S.C. § 610, prohibiting corporate contributions), and it has rarely implied a cause of

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any such commodity, or knowingly to delivery or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution."

action under a criminal statute. *Chrysler Corp. v. Brown, supra,* 441 U.S. at 316. Despite the majority's protestations, this is not one of those rare cases.

Nowhere else in the language or structure of the Commodity Exchange Act can one find any express or implied intent to benefit a special class, much less commodity speculators such as plaintiffs here. The reason is that the Act was not enacted for the "especial" benefit of any particular class but to protect the public and primarily producers and customers, against wide, sudden or unexplained fluctuations in the prices of commodities, which could ruin producers and cause serious hardship to consumers, processors, merchandisers, millers, dealers, and shippers. This was made clear by Congress in its declaration of purposes and policies underlying the Act, found in § 3 of the Act, 7 U.S.C. § 5, which has remained virtually unchanged since its enactment in 1922. Section 3 provides:

> "Transactions in . . . 'futures' are affected with a national public interest; . . . the prices involved in such transactions are generally quoted and disseminated . . . as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodities on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in

> the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodities and products and byproducts thereof in interstate commerce and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodities and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

Congress' solicitude was recently summarized by testimony in 1974 of the Administrator of the Commodity Exchange Authority (the predecessor of CFTC), Alex Caldwell, before the Senate Committee considering proposed amendments to the Act:

> "Originally back in 1922 it was the feeling of Congress that the Commodity Exchange Act was designed to protect producers. It is now recognized that it is not designed only to protect producers, but also the merchandisers and processors and ultimately the consumers." Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. at 234 (1974).

The congressional debate on the 1974 amendments amply confirms that the Act was not designed for the *especial* benefit of speculators. Representative Mayne, a member of the Committee on Agriculture, for example, stated "The purpose of the legislation before us today can best be described as a means for providing the fairest possible market for legitimate hedgers. . . .

H.R. 13113 will provide those regulations which are reasonably necessary to guide the activities of speculators . . . and no legitimate speculator . . . should object to its provisions." 80 Cong. Rec. 10739 (April 11, 1974). Representative Zwach, also a member of the Committee, stated "This legislation creates an impartial umpire, a commission that will handle the public interests, the producers' interests, the consumers' interest." *Id.* at 10740. Representative Adams claimed that "Our experiences . . . demonstrate the disastrous effects which unfair trading practices can have on consumers and producers alike." *Id.* at 10741. And Senator Scott claimed that "For the consumer, this bill will mean that commodity prices will more clearly reflect demands and actual available supplies. The kind of speculation which places artificial strains on prices will be under close scrutiny. This will mean more realistic prices for the farmer and the end products like break for the consumer will likewise be less subject to rapid increase and decrease in demand." 80 Cong. Rec. 30467 (Sept. 9, 1974).

Although speculators were recognized as necessary to the extent that they might, by increasing market volume and assuming market risks, provide more liquidity in the market for the benefit of producers and consumers and thus hopefully minimize price fluctuations to achieve some of the protection and price stability considered beneficial, Congress generally took a dim view of speculative activity in the commodity futures market because of the dangers speculators posed to farmers, producers, consumers, processors, shippers and hedgers. Unlike a hedger, who actually produces or handles the commodity, giving him an interest in the cash market for it, and trades in futures

as a means of minimizing his risks, the speculator, such as plaintiffs here, has no underlying interest in the cash market. He merely attempts to profit on the rise or fall of prices for commodity futures. Congress' skeptical attitude toward the benefits of speculation and speculators is further demonstrated by the failure of § 3, which outlines the Act's purposes, to mention speculators or investors as beneficiaries. In contrast § 3 does refer expressly to the interest of the "producer," "consumer," "shippers, dealers, millers and others engaged in the handling of commodities." Nor is this omission explained by the majority's suggestion that Congress desired to state a commerce power basis for the legislation. If speculators were viewed as a tempering and liquifying influence on an interstate market, reference to them in § 3 would have been consistent with a desire to invoke the Commerce Clause.

The various House and Senate reports on the Act and its various amendments over the years simply confirms the plain language of § 3. In 1921 the Senate Committee stated with respect to the proposed Grain Futures Act of 1922 (the first version of what was to become the Commodity Exchange Act):

> "It is believed that this bill will, by wiping out obvious abuses that are practiced on grain exchanges, result in more stable markets, and thereby enable the *producers* to secure more nearly the market price for the grain that has been possible in the past.
>
> *"Its primary purpose is to eliminate from the market some of the undesirable practices of professional speculators.*

> "In addition to curbing excessive speculation and manipulation, the bill authorizes the Secretary of Agriculture to provide means to prevent members of the exchanges from disseminating false and misleading reports on the market or on crop conditions. This in itself will be a check of the activities of professional speculators." (Emphasis added). S. Rep. No. 212, 67th Cong., 1st Sess., 4-5 (1921).

In 1936 the Senate Report on the proposed amendments stated:

> "It is of utmost importance . . . that means be adopted whereby the Government may be in a position to protect the producer and the public generally against abuses growing out of uncontrolled speculation on public markets." S. Rep. No. 1431, 74th Cong., 1st Sess. 3 (1936).

The 1936 House Report opened with a quote from President Roosevelt's first message to Congress which urged Congress to eliminate "unnecessary, unwise and destructive speculation" and "restrict, as far as possible, the use of exchanges for solely speculative operations," H.R. Rep. No. 421, 74th Cong., 1st Sess. 2 (1935), see 78 Cong. Rec. 2264 (1934), and went on to state

> "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves . . .

> "Since the passage of the Securities Exchange Act of 1934 there has been observed an increasing tendency on the part of professional speculators to transfer their activities from the securities markets, a tendency which makes the enactment of this bill without further delay of utmost importance." *Id.* at 2.

The 1974 House Report opened once again with President Roosevelt's attack on speculation, H.R. Rep. No. 93-975, *supra*, at (iii) and the Senate reports in both 1974 and 1978 used as their statement of purpose the above quoted language from the 1936 House Report. S. Rep. No. 1131, 93d Cong., 2d Sess. 1, 14 (1974); S. Rep. No. 850, 95th Cong., 2d Sess. 12 (1978). The majority contends that Congress' concern about injury to the "markets themselves" evinces an intent to protect speculators. But the clear language of the legislative history refutes that contention. Congress intended to protect exchanges from the abuses of their own members and other traders, not to protect speculators from themselves. S. Rep. No. 93-1131, *supra*, at 14; S. Rep. No. 95-850, *supra*, at 8.[6]

Throughout all these years, as the majority recognizes, the congressional debates were replete with vituperative attacks on speculators, particularly in 1922 and 1936, e.g., 61 Cong. Rec. 4763, 4765, 4768 (1921) (Remarks of Senator Clapper that if the farmer is to survive, "the grain gambler must go"); e.g., 80 Cong. Rec. 7857 (1936) (Remarks of Senator Murray

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[6] As stated by this court in *Miller v. New York Produce Exchange*, 550 F.2d 762, 768 (2d Cir. 1977), "the ultimate aim and intent of the Act is the elimination of wrongful conduct on the part of the traders. It is they, not the exchanges, who manipulate commodity markets."

that "the grain producer's income will be materially increased if the wild orgies in grain speculation can be controlled"). Congressional hostility toward speculation, though tempered, continued in 1968 and 1974. E.g., 113 Cong. Rec. 34404 (Nov. 30, 1968) (Remarks of Representative Sullivan that "excessive speculation in futures . . . has not only contributed to inflationary surges in the futures market but has caused spectacular increases in consumer prices"); 80 Cong. Rec. 30465 (Sept. 9, 1974) (Remarks of Senator Hart that "This bill gives the commission authority . . . to prevent inflationary prices which do not reflect supply and demand—but are the result of speculation. . . .").

Moreover, it has been the speculators and the Congressmen representing their interests who have consistently opposed the expansion of federal regulation of the commodity markets, since they realize that it is they who are being regulated. See, e.g., H.R. Rep. No. 1522, 73d Cong., 2d Sess. (1934) (minority report); H.R. Rep. No. 93-975, *supra*, at 166 (1974) (minority report) ("We believe that the bill's premise displays . . . a lack of faith in . . . the importance of speculators. . . ."); 120 Cong. Rec. 10744 (April 11, 1974) (Statement of Representative Symms that we need "more not less" speculation). It may well be that investors do benefit from an honest market, but that is a far cry from concluding that the Act was enacted for their "especial benefit." As put on the House floor "Speculation may not be evil, but neither is it a thing of beauty and a joy forever." 113 Cong. Rec. 10838 (August 11, 1967) (Statement of Assistant Secretary of Agriculture Mehrens before the House Committee on Agriculture, quoted on the House floor). And Representative Smith in 1974 summed up the prevailing view that speculation was a necessary evil:

"When these markets were first brought under Federal regulation back in 1922—Grain Futures Act—it was recognized that involving some gamblers would be necessary in order to provide the liquidity needed so dealers in commodities could readily hedge their transactions.

"The Commodity Exchange Act was designed to limit and regulate this form of gambling in tandem with hedging for the purpose of reducing 'sudden or unreasonable fluctuations in the prices . . . which are detrimental to the producer or the consumer and the persons handling commodities. . . .' Clearly, the primary purpose of the law which permits commodity markets to exist is to serve those who hedge, and speculation is to be permitted only to the extent that it serves the primary purpose." 120 Cong. Rec. 10750 (April 11, 1974).

Thus, given the general opposition of speculative interests to these bills and Congress' skepticism about the benefits of speculation and its keen awareness of the dangers posed by speculative excesses, it is disingenuous to claim that the Act was designed for the *especial* benefit of speculators. Speculators such as plaintiffs can hardly be said to be the "favored wards" of Congress. Nor is the language of the Act as a whole or of its provisions drafted with an "unmistakable focus on the benefited class." *Cannon, supra*, 441 U.S. at 691. The Court's language in *Piper v. Chris-Craft Industries, Inc., supra*, 430 U.S. at 37, applies here:

"As previously indicated, examination of the statute and its genesis shows that Chris-Craft [a defeated tender-offerer] is not an intended beneficiary of the Williams Act, and surely is not one 'for

whose especial benefit the statute was enacted.' Ibid. To the contrary, Chris-Craft is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class, shareholders-offerees. As a party whose previously unregulated conduct was purposefully brought under federal control by the statute, Chris-Craft can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."

Accord, *Liang v. Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979) (nothing in the language of § 9(b) or its legislative history indicates that it was enacted for the especial benefit of speculators). *Stone v. Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980) ("the entire history of commodities regulation" suggests that "ensuring the integrity of the market system, rather than merely protecting individual customers" has been the motivating force behind the Act.").[7]

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[7] The majority mistakenly relies on a statement in the 1978 House Report to the effect that under the 1936 amendments "the community protected under the federal commodities law was expanded to include speculators," H.R. Rep. No. 1181, 95th Cong., 2d Sess. 84 (1978). Quite apart from the fact that the quote comes from a law review article simply incorporated into a subsequent House Report (1978) and is therefore not entitled to the weight normally given to committee reports, see *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 48 U.S.L.W. at 4662 (post-hoc statement of a subsequent conference committee report not entitled to much weight in discerning the intent of an earlier Congress) and *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 ("[t]hese isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment"), the statement simply does not support plaintiffs' position here. Even assuming that the legislative

Thus § 9(b), like § 4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors.[8] In any event,

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history does show an intent to offer *some* protection to speculators, there is no suggestion that Congress enacted the statute for the *especial* benefit of speculators or intended to confer a private right of action in favor of speculators. Indeed, the legislative history is just to the opposite; Congress was primarily concerned about producers and consumers.

The majority's reliance on our decision in *Ames v. Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174 (2d Cir. 1977), as supporting a private right of action is similarly misplaced. There the dispute involved a *customer and his broker* and we declined to compel arbitration, noting that "on this appeal, we are not called upon to decide whether the complaint states a claim for relief." *Id.* at 1176. Thus, the court's passing statement that the Act was enacted for the protection of "investors" has no bearing whatsoever on the question before us, whether the Act was designed for the especial protection of these plaintiffs, who are speculators, not customers.

Footnote 25 of the majority opinion suggests that regulated persons may belong to the class for whose special benefit a statute is enacted, with which we do not disagree. However, where (as here) Congress has specifically enumerated the persons for whose benefit the statute has been enacted (i.e., the public producers, consumers, shippers, dealers, millers and hedgers) but has studiously omitted speculators, we may reasonably infer that Congress did not intend to include speculators among the benefited group.

[8] Some of the plaintiffs here also allege that the defendant brokers have violated § 4a of the Act, 7 U.S.C. § 6a. Section 4a states in relevant part that "Excessive speculation in any commodity under contracts of sale of such commodity for future delivery . . . causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, *is an undue and unnecessary burden on interstate commerce in such commodity*" and authorizes the CFTC to fix quantitative limits on trading "for the purpose of diminishing, eliminating, or preventing such burden. . . ." (Emphasis added). The CFTC has set by regulation certain limits on short trading which are alleged to have been violated by the short sellers with the knowledge of their brokers. 17 C.F.R. § 150.10.

No court has ever found a private cause of action to exist under § 4a. The section serves as a general prohibition against excessive

even assuming *arguendo* that this criminal statute benefits speculators, there is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act.

(2) *Sections of Act relied on by plaintiffs to support claims against the contract market defendant.* (§§ 5(d), 5a(8) and 9(b), 7 U.S.C. §§ 7(d), 7a(8) and 13(b))

Appellants rely upon portions of §§ 5 and 5a of the Act, 7 U.S.C. §§ 7 and 7a, and to a lesser extent on § 9(b), 7 U.S.C. § 13(b), already discussed above, as the

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speculation in commodity futures and its purpose—the removal of the burden of excessive speculation on interstate commerce in order to stabilize the price of the commodity itself, not the price of the future contract—is clearly described. The plain language of the section, then, indicates that it was designed for the protection of the general public. Nor is there any suggestion that Congress intended to confer any private right of action upon any person, let alone a speculator, who might be claimed to be damaged as a consequence of a violation of the section. See *Transamerica, supra*, 100 S. Ct. at 247; *Kissinger, supra*, 48 U.S.L.W. at 4226. Only one case has even addressed the issue of an implied cause of action under § 4a and it concluded that investors were not within the class of persons for whose especial benefit the statute was created, reasoning that "the excessive speculation provision is primarily intended to protect outsiders from the activities of all speculators, not speculators from themselves." *Liang v. Hunt*, 477 F. Supp. 891, 893 (N.D. Ill. 1979).

Plaintiffs also charge that the defendant brokers violated Exchange Rule § 44.02 by failing to have liquidating orders placed within five minutes after the close of the trading limits even though they knew or should have known that their customers could not deliver potatoes. Since it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange, *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980), it is not surprising that the majority makes no effort to claim that plaintiffs here have a cause of action against the brokers for their alleged violation of Exchange Rule § 44.02. Accordingly, we need not address the issue.

source of an implied private right of action against New York Mercantile Exchange and its officers. Section 5 is a licensing statute which imposes upon the CFTC the duty of designating boards of trade as "contract markets" provided they comply with specified conditions and requirements, including in subdivision 5(d) "the prevention of manipulation of prices and the cornering of any commodity by the dealers and operators" upon the Exchange.[9] Section 5a, 7 U.S.C. § 7a, provides that each contract market shall comply with 12 requirements, including the enforcement of its own rules, regulations and resolutions which have been approved by the CFTC, § 5a(8) of the Act, 7 U.S.C. § 7a(8).[10]

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9 Section 5 provides in relevant part:

"The Commission is hereby authorized and directed to designate any board of trade as a 'contract market' when, and only when, such board of trade complies with and carries out the following conditions and requirements:

a. [when it is located in a terminal market where any cash commodity is sold in sufficient quantities so that futures contracts fairly reflect the general value of the commodity]
b. [when it provides for the filing of reports concerning the transactions occurring on the exchange]
c. [when it provides for the prevention of the dissemination of false information by the board or any member]
d. When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board. . . ."

10 Section 5a(8), 7 U.S.C. § 7a, reads in relevant part:

"§ 5a *Duties of contract markets*

"Each contract market shall—

. . . . .

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have

Plaintiffs here allege that the New York Mercantile Exchange violated the Act and the Regulations by failing (1) to maintain an orderly market for trading, (2) to report violations, (3) to direct the entry of liquidating orders, (4) to declare an emergency, (5) to extend the period for delivery or to allow delivery by truck, (6) to buy potatoes for the account of short sellers who did not make delivery as required by their contracts, and (7) to perform its duties as a contract market, including exercise of due care to halt manipulative practices.

As the Court pointed out in *Cannon, supra*, 441 U.S. at 690 n.13, a statute will ordinarily be construed as creating an implied private remedy only where it "explicitly conferred a right directly on a class of persons including the plaintiff in the case." Here the prescriptive language of § 5 and § 5a, like the reporting statute in *Redington, supra*, 442 U.S. at 569, "does not

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been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission; . . ."

In addition to subsection (8), § 5a requires contract markets to (1) furnish the CFTC with copies of its by-laws and regulations, keep records of all of the proceedings of its governing board, (2) require the operators of the warehouses to keep records and make them available for inspection by the CFTC, (3) obey CFTC orders concerning the delivery of the cash commodity, (4) require the party making delivery to furnish notice of intended delivery to the party obligated to accept delivery, (5) require that warehouse receipts be accepted as satisfaction of debt, (6) enforce its by-laws and regulations relating to the minimum financial standards required of those future commission merchants who are members of the market, (7) permit delivery of any commodity in a location which will tend to prevent price manipulation, (8) provide for an arbitration procedure for customer grievances, § 5a(11), and (9) submit to the CFTC for approval its by-laws, rules, regulations and resolutions. § 5a(12).

by its terms, purport to create a private cause of action in favor of anyone." Neither provision "grants private rights to the members of any identifiable class, nor proscribes any conduct as unlawful," *id.* They therefore cannot support a private cause of action in favor of these plaintiffs.

Nothing in the foregoing sections of the Act provides any basis for an inference that they were enacted for the especial benefit of plaintiffs, much less that a private right of action was intended. Here again Congress' adoption of a battery of other express remedies indicates it had no intent to create or approve an implied private right of action against exchanges. See *Transamerica, supra,* 100 S. Ct. at 247-48. Although exchanges may not be the subject of reparations proceedings, if they violate the Act the CFTC may suspend or revoke their designation as contract markets, §§ 5b, 6(a) of the Act, 7 U.S.C. §§ 7b, 8, sue in federal courts, which are expressly vested with jurisdiction, to enjoin violations, 6c of the Act, 7 U.S.C. § 13a-1, assess civil fines of up to $100,000 for each violation and issue cease and desist orders, non-compliance with which subjects the market and its officers to a $100,000 fine or imprisonment. § 6b of the Act, 7 U.S.C. § 13a. The exchanges, of course, are also subject to criminal penalties of up to a $500,000 fine and 5 years imprisonment for violations of the Act and price manipulation. § 9(b) of Act, 7 U.S.C. § 13(b).

Lastly, in 1968 Congress failed to enact a bill which would have made contract markets liable to aggrieved persons for violations of the Act. H.R. 9178, 90th Cong., 1st Sess. § 32 (1967); see Statement of Representative Fino introducing the bill, 113 Cong. Rec. 10839 (April 26, 1967). This indicates that

Congress did not intend to sanction a private remedy against exchanges.[11]

OTHER CIRCUMSTANCES POSSIBLY BEARING ON LEGISLATIVE INTENT TO CREATE OR APPROVE AN IMPLIED PRIVATE ACTION

(1) *Pre-1974 lower federal court decisions implying private rights*

Faced with the fact that nothing in the language of the Commodity Exchange Act, the various amendments of it over the years, and its legislative history even remotely suggests congressional intent to approve, much less create, an implied private right of action, the majority relies almost completely on the fact that prior to the 1974 amendments various lower federal courts, beginning in 1967, had implied certain types of private rights of action under the Act and that Congress' failure, in face of these decisions, to expressly extinguish or nullify these decisions must be taken as evidence of an intent *sub silentio* to approve the continued implication of private actions under the Act.[12] In short, the argument goes, in amending the Act

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11 Significantly, the 1968 amendments consisted of 27 sections. Of these, 13 sections and 3 subsections are identical to H.R. 9178, Representative Fino's bill, Pub. L. No. 90-258 §§ 1(a), 1(b), 3, 6, 7(a), 9, 10, 11, 13, 14, 15, 18, 19, 22, 30, 34, 82 Stat. 26, *et seq.* (1968), and 8 sections and 2 subsections are altered versions of his provisions, Pub. L. No. 90-258 §§ 2, 4, 5, 7(b), 8, 12(b), 16, 20, 24, 25; 82 Stat. 26, *et seq.* (1968). This indicates, of course, that Congress acted with discrimination and care in rejecting § 32, the provision authorizing private damage suits.

12 *Anderson v. Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, 437 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); *United*

in 1974 Congress had the burden of taking affirmative action to disapprove implied private rights found by some courts to have existed under the Act and, in the absence of its doing so, the holdings of these decisions may be presumed to survive.

The argument puts the cart before the horse. Where, as here, Congress has expressly provided for judicial and administrative means of enforcement, the burden is on plaintiffs to show a clear and affirmative congressional intent to approve a private right of action, not on Congress or defendants to show that the remedies provided by it are exclusive. *Transamerica, supra*, 100 S. Ct. at 247; *Securities Investors Protection Corp. v. Barbour, supra*, 421 U.S. at 419; *Amtrak, supra*, 414 U.S. at 458. The issue is whether Congress intended to approve a private right of action, not whether (as the majority frequently states, maj. opin. p. 65 n.40) it intended to "destroy" or "eliminate" a pre-existing private right, which assumes the matter in controversy. Nor may we simply presume that Congress by its silence intended to approve a "pre-existing" private right of action, since the Supreme Court has made clear that "in the absence of the clearest indication that

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Egg Producers v. Bauer International Corp., 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338, 1343 (E.D. La. 1972), *affd.*, 477 F.2d 113 (5th Cir. 1973); *Gould v. Barnes Brokerage Co., Inc.*, 345 F. Supp. 294, 295 (N.D. Tex. 1972); *Johnson v. Arthur Epsey, Shearson, Hamil & Co.*, 341 F. Supp. 764, 766 (S.D.N.Y. 1972); *Arnold v. Bache & Co.*, 377 F. Supp. 61, 65 (M.D. Pa. 1973); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir.), *revd. on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (per curiam); *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), *affd. sub nom., Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 423 (1977).

Congress intended that" a new statute "should preserve" a pre-existing private cause of action, it would "decline" to imply one under the new statute. *T.I.M.E. Inc. v. United States, supra*, 359 U.S. at 475. To hold otherwise is to stand the principles of *Cort v. Ash* and the more recent Supreme Court decisions on their heads. Quite apart from this fundamental defect, the argument must be rejected for the reason that a close examination of the decisions and legislative history relied on by the majority demonstrates that they do not support a *sub silentio* intent by Congress in 1974 to approve implied private rights of action.

In the first place the earlier decisions and legislative history do not reveal any long-recognized private cause of action in favor of speculators such as plaintiffs against contract markets or broker-dealers with whom the speculators had no customer-broker relationship. For 45 years prior to the first decision relied on by the majority the provisions of the Act were enforced solely through use of the administrative remedies made available to the Secretary of Agriculture and the Commodity Exchange Commission, the predecessor to the CFTC, and through criminal proceedings based upon violations of the Act. Despite such incidents as the manipulation of the onion futures market in the 1950's, see S. Rep. No. 1631, 85th Cong., 2d Sess. 1958), reprinted at 1958 U.S. Code Cong. & Ad. News 4210, 4214, the salad oil swindle of the early 1960's, N. Miller, The Great Salad Oil Swindle, and other less publicized schemes to manipulate the market and defraud participants, and despite the implication of a private right of action under the Securities Act as early as 1944, *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), no court prior to 1967

suggested that a private cause of action under the Act might exist.[13] Even the Commodity Exchange Commission believed that administrative sanctions and criminal penalties were the only means by which the Act could be enforced. See letter from Department of Agriculture, Commodity Exchange Authority, dated March 21, 1958, to counsel for the Senate Committee of Agriculture and Forestry, reprinted at 1958 U.S. Code Cong. & Admin. News 4216.[14]

Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967), was the first case to break the barrier. It is significant not because it was the first but because it is the case on which all of the later decisions implying a

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13 The majority opinion (footnote 16) chooses to interpret our statement as implying that "victims of frauds in futures trading had never resorted to the federal courts prior to *Goodman* (infra)", whereas we actually state that prior to that decision no court had held that a private cause of action under the Act would be recognized. There may well have been lawsuits, but the legal basis of the claims made in these suits is not reported and, more important, prior to 1967 no court to our knowledge ever passed on the issue here, i.e., the existence of an implied private right of action.

14 The letter reads in relevant part:

"Dear Mr. Stanton [Counsel on Agriculture and Forestry, United States Senate.]

* * * * *

"You requested a memorandum concerning the effect of the absence from these bills of any provision to amend section 9 of the Commodity Exchange Act so as to make a violation of proposed section 4j a violation of the penal provisions of the act.

"As you recognize, in the absence of a provision subjecting violations of the proposed section to the criminal provisions of the statute, it would appear that the *sole* means of enforcement afforded by the act would be by way of administrative complaints. [Emphasis added].

"Sincerely,

Rodger R. Kaufman,
Administrator."

private cause of action summarily relied. All of these were lower federal court decisions. The Supreme Court never passed upon the issue. *Goodman* involved a suit brought under § 4b by two customers against their broker-dealer in which they claimed they were defrauded by the broker-dealer. The court, relying on § 286 of the Restatement of Torts, found that the customers fell within the class of persons Congress intended to protect when it enacted § 4b (i.e., customers) and that violation of the section was a statutory tort for which the customers had a federal remedy. The court also relied on the dissent in *Wheeldin v. Wheeler*, 373 U.S. 647, 661-62 (1961), which stated that private rights are "implied unless the legislature evidences a contrary intention." Finding "no indication in the Commodity Exchange Act that Congress intended not to allow private persons injured by violations access to the courts," 265 F. Supp. at 447, the court implied a private remedy.

It hardly merits discussion that *Goodman*, in light of current law, was wrongly decided since it did not even purport to consider, as required by the recent cases of *Cannon, Redington, Transamerica,* and *Kissinger* and earlier by *Cort v. Ash*, whether Congress intended to create a private right of action when it enacted § 4b. Indeed, the Court has repeatedly rejected the tort rationale relied upon in *Goodman*, requiring a showing of Congressional intent to approve a private right of action. See, e.g., *Redington, supra*, 442 U.S. at 568, 578, quoting *Cannon, supra*, 441 U.S. at 688. More significantly, perhaps, is that *Goodman* may well have been incorrectly decided even under then existing law. The proposition that a private right of action will be implied unless Congress evinces a contrary intention is

unsupported by any prior holding and did not accurately reflect the state of the law as it then or later existed. Even *J.I. Case Co. v. Borak, supra*, 377 U.S. 426, widely considered to be the case in which the Supreme Court has gone the furthest in implying a cause of action, required more of a showing than did the *Goodman* court. The test, according to *Borak*, was whether a private right of action was necessary to effectuate Congress' intent in enacting the statute. *Id.* at 432.

Nor can we presume the correctness of the *Goodman* decision simply because it occurred during a period in which private rights of action were "routinely implied" by the courts. The majority overstates the extent to which courts were then implying private causes of action, ignoring such cases as *Wheeldin v. Wheeler*, 373 U.S. 647 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959); *Montana & Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); *General Committee v. M.K.T.R. Co.*, 320 U.S. 323 (1943); *General Committee v. Southern Pacific Co.*, 320 U.S. 338 (1943); *Switchman's Union v. National Mediation Board*, 320 U.S. 297 (1943), all of which rejected such claims of private right. And even in the area of securities, the courts denied private rights of action. E.g., *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 81 (1966); *O'Neill v. Maytag*, 339 F.2d 764 (2d Cir. 1964).

The majority contends, however, that the correctness of the *Goodman* decision, and the cases summarily following it, is irrelevant, reasoning that what matters instead is whether Congress perceived those cases to be correct when it enacted the 1974 amendments. But even accepting this proposition, not a single word of

approval of these decisions is found in the legislative history of the 1974 or any other amendments, much less mention of any of these decisions by name. Moreover, the lower court decisions relied on by the majority do not support its position. Of the 11 cases decided prior to 1974, 8 were brought *by customers against their brokers-dealers under § 4b*, not by speculators like plaintiffs against broker-dealers with whom they had no relationship. See, e.g., *Anderson v. Francis I. du Pont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132 (5th Cir. 1970); *Johnson v. Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 746 (S.D.N.Y. 1972); *Gould v. Barnes Brokerage Co. Inc.*, 345 F. Supp. 294 (N.D. Tex. 1972); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972), *affd.*, 477 F.2d 113 (5th Cir. 1973); *Arnold v. Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1973). Likewise the Sixth Circuit's recent decision, *Curran v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (May 12, 1980), relied on by the majority, is not dispositive of this case since it also involved a suit by a customer against his broker under § 4 of the Act, 7 U.S.C. § 6. Although § 4b could conceivably be construed as protecting customers against being defrauded by their brokers, it certainly does not protect others, such as plaintiffs here, against fraud or manipulation by persons with whom they had no broker-dealer relationship.

To be sure, three cases did imply a private right of action in favor of someone other than a customer against his broker. However, two are irrelevant for the

purpose of inferring what Congress may have "perceived" the state of decision law on the subject to be in 1974. In *United Egg Producers v. Baurer International Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970), the court, relying on *Goodman*, implied a cause of action under § 9(b) of the Act in favor of a group of commodity producers, not customers or mere traders, who sought injunctive relief, not damages, against an import company to prevent them from releasing inaccurate investment information. In *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076 (S.D.N.Y. 1974), *affd. sub nom., Miller v. N.Y.P.E.*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977), the court, relying on *Deaktor*, *infra*, held that a cause of action was available to a broker-dealer, not a customer or even a trader, against an exchange under § 9(b). Since that case, however, was decided after the House had passed the 1974 amendments, Congress could not have been aware of it. It therefore offers no support for the majority's theory that Congress, by relying upon it, thought it unnecessary to provide expressly for a private right of action.

Thus plaintiffs are reduced to one case, *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd. on other grounds sub nom., Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), decided less than a year before the enactment of the 1974 amendments, as support for the private cause of action asserted here. There a trader brought suit against an exchange for a violation of § 5a(8) and § 9(b), and the court, relying on *Goodman*, found that § 9(b) was intended to protect the interests of the plaintiff traders and accordingly implied a cause of action under it, though not under § 5a(8). Although the majority contends that the

Supreme Court's reversal of *Deaktor* can be read as support for the lower court's implication of a private right of action, that argument is without merit since the Court expressly declined to decide the issue and held that plaintiffs must proceed through the CFTC, not through the courts. See 414 U.S. at 115. Where the Supreme Court has declined to reach an issue, it is serious error to parse the Court's opinion for some hidden indication that the Court actually decided the issue after all. The majority's strained interpretation of *Deaktor* is illusory.

In speculating as to what Congress must have "perceived" about the state of the law relating to implied rights when it overhauled the Act in 1974, one must take into account as against *Deaktor*, which was not finally disposed of by the Supreme Court until December 3, 1973, see 414 U.S. 113, the Court's decision in *Amtrak*, *supra*, 414 U.S. 453, decided on January 9, 1974. There the Court rejected a claim of an implied private right under § 307(a) of the Amtrak Act, relying on Congress' rejection of an express remedy and its express authorization of other remedies, stating that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." 414 U.S. at 458.

The majority also relies heavily on the fact that "[d]uring the 1940's, 1950's and 1960's there was a widespread, indeed almost general, recognition of implied causes of action for damages under many provisions of the Securities Exchange Act" (majority opinion, p. 23), apparently on the theory that we must infer that Congress in enacting the 1974 Amendments assumed that the courts would as readily imply a cause

of action under the Commodity Exchange Act as they had under the securities laws. That argument has a number of serious flaws.

First, the Supreme Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 2, 13 n.9 (1971), merely acquiesced in the *25-year old* acceptance by the lower courts of an implied private right of action under § 10(b) of the Securities Exchange Act. See *Cannon, supra*, 441 U.S. at 690-93, n.13, which suggests that absent that long-standing prior interpretation the Supreme Court would not have found a private right of action under § 10(b). Since there is no such long-standing history of judicially implied rights under the Commodity Exchange Act, there is simply no basis for inferring that Congress could have assumed that the Court would similarly acquiesce in a private right of action under that Act.

Second, the majority seems to suggest that, because a number of the early securities cases implied a private right of action under the securities laws even though those laws contained express remedies, Congress could assume that the courts would similarly imply a private right of action under the Commodity Exchange Act, which also contains a number of express remedies. That is simply not the case. In *Baird v. Franklin*, 141 F.2d 238, 244-45 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), heavily relied on by the majority, Judge Clark implied a private right of action under the Securities Exchange Act of 1934 because the express remedies were merely punitive and remedial, not compensatory. Section 14 of the Act here, in marked contrast, expressly provides for compensatory damages. Since the securities laws provide for less complete remedies than the Commodity Exchange Act, any analogy between the judicial history

of private rights of action under the securities laws and the Commodity Exchange Act is bound to be of limited relevance.

Third, the majority seeks to distinguish such cases as *Transamerica, supra*, 100 S. Ct. 242, and *Redington*, 442 U.S. 560, on the ground that the 1974 Amendments were passed well after the "great explosion" of judicially recognized private rights of action. The majority, however, ignores the fact that the sections of the Act most heavily relied on by plaintiffs, §§ 4b, 9(b) and 5d, were all enacted in 1923 and 1936, well before any "explosion" in private rights of action. Like the statutes in *Redington* and *Transamerica*, nothing in the legislative history of 1923 or 1936 indicates that Congress intended to create a private right of action under any of the provisions relied on by plaintiffs.

As the law existed prior to 1974, then, the majority's contention that the courts had long recognized a private right of action in favor of these plaintiffs rings hollow. The Supreme Court had never spoken on the subject. No lower federal court had implied a cause of action under § 5(d), § 5a(8), or § 4a. Nor had any court implied a cause of action in favor of one not a customer against a broker-dealer under § 4b. *Deaktor*, which implied a cause of action in favor of a speculator against an exchange under § 9(b), had been decided less than a year before the enactment of the 1974 amendments. This decision, which was never mentioned in the congressional debates as a basis for an implied right of action, is the sole case which could conceivably be relied upon as pre-1974 authority for the proposition advanced by the majority here that Congress "perceived" the private rights of action to be available under the Act in favor of speculators against brokers or

exchanges. It seems most unlikely that Congress had even heard of it, much less relied upon it, in adopting the 1974 amendments. Given the crucial importance of *Deaktor* to the majority's argument, Congress' failure to mention *Deaktor* is highly significant, despite the majority's protestations to the contrary. Absent some indication that Congress knew that a lower court had implied a private right of action in favor of a *speculator against an exchange*, as opposed to its possible knowledge that the court had implied a private right of action in favor of a *customer against his broker under § 4b*, we simply cannot presume that Congress was aware of *Deaktor*, let alone silently approved of the private right of action it found.

(2) *References in Congress to Private Civil Suits*

The majority next relies upon a few scattered references to private civil actions in the course of hearings by House and Senate Committees with respect to the proposed 1974 amendments. None of these, however, reveal any approval or ratification of such rights. Indeed the evidence is overwhelming to the contrary.

The Senate

Not a single mention of private civil actions is to be found either in the Senate Committee Report with respect to the 1974 bill or on the Senate floor. The only references during the lengthy Senate hearings were those of Senator Clark, Professor Schotland of Georgetown University, and Ms. Judy Jackson, a representative of the Consumer Federation of America, with respect to a provision in a bill introduced by Senator Hart which would have expressly authorized private

civil suits for violations of the Act, S. 2837, § 505(a), and treble damages for willful violations, § 505(b). During the Senate hearings on various proposed bills, including the Hart bill, H.R. 13113 (the already passed House bill), S. 2485 (the Humphrey Bill) and S. 2378 (the McGovern Bill), numerous witnesses specifically addressed the Hart Bill and vigorously urged that the Committee adopt the private right of action provided by it. Commodity Futures Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113, *supra*. Professor Schotland stated that it was "hard to be emphatic enough in favor of [§ 505]" and that "private citizen action for self protection, with full judicial protections, is an enormous step toward helping assure vigorous regulatory action," *id.* at 737, 747. Ms. Judy Jackson noted that neither the Humphrey Bill nor the House bill contained any provision for private civil actions; *id.* at 369. Senator Clark, co-sponsor of the Hart Bill and a member of the Committee, *id.* at 205, spoke in support of private treble damages under the bill. Professor Schotland warned about the need for explicit language approving private rights of action. He stated that if Congress decided to adopt the reparations procedure and place "such virtually unprecedented responsibility and burden in this regulatory body, there should be explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there," *id.* at 737, 747.

Congress rejected the bills. Under a principle of statutory construction expressly endorsed by the Supreme Court in *Amtrak*, *supra*, 414 U.S. at 461, a decision ignored by the majority on this point, where as here Congress has before it a specific proposal to

authorize private rights of action and after full and careful consideration declines to adopt that proposal, its action must not be treated as evidence of intent to approve private rights of action, but rather as an intent to preclude them. Moreover, its action certainly negates the majority's argument that Congress intended *sub silentio* to encourage the lower courts to continue to imply private rights of action.

It is suggested that Congress refused to adopt the private right of action proposals because of its opposition to treble damages. But this was never a position articulated by any lawmakers, who obviously could have eliminated the treble part of the damages with the stroke of a pen and left standing the provision for compensatory damages. The Senate instead chose to reject the proposition that civil monetary damages be recoverable in any action other than a reparations proceeding.[15]

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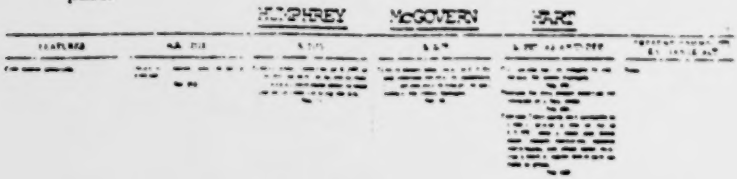
15 Indeed, the Senate had before it a chart comparing the provisions of the four bills under consideration, a chart that omitted any reference to the possibility that private damage suits were available under the existing Act. The comparison chart reads in pertinent part:



Commodity Futures Commission Act: Hearings before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113, *supra*, at 194. Representative Neal Smith introduced a bill in the House, which like Senator McGovern's bill, expressly created an action for treble damages. H.R. 11195, 93d Cong., 1st Sess. § 17 (1973). In 1974, Rep. Smith introduced a similar bill which provided for the reparations procedure which was eventually enacted as § 14, but deleted the provision for treble damages. H.R. 11195, 93d Cong., 2d Sess. (1974).

The House

Turning to the history of the legislation before the House, the latter's Report with respect to the bill makes only two references to an implied private right of action, neither of which evince an intent by Congress to preserve that right. The Report stated that § 5a(8) of the 1968 amendments, which required contract markets to enforce their own rules and which was designed to strengthen self-regulation, had in fact worked to weaken it because, as the Committee was informed,

> "[A]ttorneys to several boards of trade have been advising the boards of trade to reduce—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." H.R. Rep. 93-975, *supra*, at 46.

The Report also stated that one of the reasons for changing the law was

> "(2) Growing difficulties facing exchanges engaged in self regulatory actions as a result of private plaintiffs seeking damages against self-regulatory activities of the markets. As examples, exchanges are sued for actions taken in emergency situations even when the action has been taken at the request or order of the CEA." *Id.* at 48.

Similar language was used by Chairman Poage when he discussed the bill on the House floor, 119 Cong. Rec. 41333 (Dec. 13, 1973).[16] Although it may demonstrate

16 Chairman Poage also stated on the House floor that "when the Commodity Exchange Act was enacted, courts implied a private

an awareness by key personnel in Congress of lower court decisions implying a cause of action under the Act, it hardly constitutes approval of those decisions. In the first place, the Supreme Court has recently reminded us that "even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 48 U.S.L.W. at 4662. Second, the language merely recognizes a "growing body of opinion" concerning private rights of action. Had Congress intended to approve or encourage that fledgeling body of law, it could and would have indicated as much. Third, rather than extol the virtues of private rights of action, the Report and Chairman Poage emphasized the problems created by private rights and pointedly criticized private suits against exchanges for action taken by them pursuant to order or request of the CEA, now the CFTC.

I find no logical basis for reading this rather explicit language criticizing private rights of action as congressional *approval* of such suits, which is what the majority attempts to do. The majority argues that Congress was not criticizing private rights of action but merely the problems they created and that, desiring private suits to continue, it sought to preclude exchanges from reducing their rules in order to avoid civil liability by empowering the CFTC to require the exchanges to adopt appropriate rules. This sheer speculative extrapolation is not supported by anything

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remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (Dec. 13, 1973). He, of course, erred: a private right of action was not implied by a lower court until 1967.

in the legislative history of the amendments. Indeed it is refuted by the plain language of the House Report.[17]

A more sensible interpretation of the 1974 amendments is that Congress sought to create a uniform comprehensive, cohesive and coherent system of regulation, H.R. Rep. 93-975, *supra* at 1; S. Rep. No. 95-850, *supra*, at 10, 13. Believing that private rights of action were inconsistent with that purpose, it sufficiently increased the powers of the CFTC so that it, rather than private individuals, would be responsible for monitoring the futures trading market.[18]

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17 Chairman Poage himself retreated on the significance of private rights of action. In December, 1973, when he introduced the bill to the House he claimed that the threat of private suits was one reason why the exchanges had cut back on their rules. On April 11, 1974, however, when he presented the bill from his Committee to the House for approval he stated "Regulation by the exchanges is not working as well as it should, and *partly as a result of technicalities of present law* the exchanges may be cutting back on their self-regulatory activities when they should be increasing their efforts in todays markets." 120 Cong. Rec. 10736. (Emphasis added).

Private rights of action hardly constitute "technicalities of present law." Thus, on the day in which Congress' attention was most focused on the Commodity Exchange Act—in fact it was the day the House passed the bill—not one word was mentioned about private rights of action. It strains credulity to suggest, as the majority does, that Congress somehow *relied* on private rights of action when it enacted the 1974 amendments.

18 The majority also relies on the cursory objections to private rights of action raised by one or two representatives of the commodities industry in the House hearings, see, e.g., Commodity Futures Trading Act of 1974: Hearings Before the House Committee on Agriculture on H.R. 11955, 93d Cong., 2d Sess. 249 (1974). The majority reads far too much in the "failure" of Congress to respond to these scattered, vague and unfocused comments. As stated by the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1975):

> "Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 276-277

Intent in Enacting Reparations Procedure and Other Remedies

Both the 1974 Senate and House Reports exhaustively outline the enforcement tools available under the Act as it then stood, together with the additional remedies recommended and finally adopted. S. Rep. No. 1131, 93d Cong., 2d Sess. 11-27 (1974), H.R. Rep. 93-975, *supra*, 33-53. There is not the slightest suggestion that the panoply of enforcement remedies provided by Congress, including reparations proceedings, was intended to supplement private civil rights, as the majority here urges. Indeed, no legislator has ever linked the reparations procedure to private causes of action or mentioned them in the same breath. Though of course it is not defendants' burden to show that Congress intended an express remedy to be exclusive, what little direct evidence there is about the purpose of the reparations procedure suggests that it and the informal arbitration procedures were intended to be exclusive. The House Report, for example, stated that the reparations procedure is

> "intended as a separate remedy designed to supplement the informal 'settlement procedures' contemplated of contract markets. . . . It is the intent of the Committee that those complaints which can be resolved informally and settled without a formal proceeding [the reparations

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(1947); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). This is especially so with regard to the statements of legislative opponents who '[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach.' *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964). See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951)."

> proceeding] through the mechanism contemplated of the contract market . . . should be encouraged to resolve that matter." H.R. Rep. 93-975, *supra*, at 22.
>
> "A customer reparations proceeding before the Commission will be authorized one year after date of enactment for handling customer complaints which arise from violations of the Act, particularly those which result in monetary damages loss to the customer. The commission will have original jurisdiction to consider *all such complaints* which have not been resolved through the informal settlement procedures required of the contract market and registered futures associations under the bill." *Id.* at 3.
>
> *"The provision for this review and settlement of customers accounts should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." Id.* at 83. (Emphasis added). (Letter to the Committee from Department of Agriculture.)

Congress has also explicitly stated that the reparations procedure was created to "offset a suspected industry bias favoring the resolution of customer claims through arbitration," H.R. Rep. No. 1181, 95th Cong., 2d Sess. 91 (1978), thus casting further doubt on the theory that the procedure was intended to supplement private rights of action. Equally revealing is the Senate's belief that where futures associations adopt arbitration procedures, thus relieving contract markets of their duty to adopt similar procedures, "aggrieved customers

. . . would have their choice of seeking resolution of their claims through an association arbitration or reparations proceedings, or a Commission reparations proceeding," S. Rep. No. 95-850, *supra*, at 32. For present purposes it is significant that the "choice" does not include a private right of action.[19]

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19 The few comments relied upon by the majority as evidence of Congress' intent to approve a private right of action are also too vague and abstruse to entitle them to any appreciable weight. First, the majority overstates the significance of Chairman Poage's statement that the act "sets up new consumer protection features." 120 Cong. Rec. 10737 (April 11, 1974). It is not surprising that Chairman Poage used the term "new" to describe the Act's enforcement provisions, including the CFTC's authority to bring suits and levy civil penalties and the reparations procedure, since these provisions were "new." By the use of the term "new" Chairman Poage did not mean that the remedies were "in addition to" or "supplementary" to *implied private right of action*. At most he meant that the remedies were in addition to the express remedies already contained in the Act. Had he intended that these remedies supplement implied private rights of action, he would have said so directly, not through an ambiguous reference to "new" remedies.

Similarly, the majority places unjustified weight on two comments of Senator Talmadge on the Senate floor. On September 9, 1974, while discussing the exclusive jurisdiction provision, § 201 of the House bill, discussed more fully *infra*, he stated:

> "In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws, nor for the Commodity Futures Trading Commission to usurp powers of other regulatory bodies such as those of the Federal Reserve in the area of banking or the Securities and Exchange Commission in the field of securities.
>
> "The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved." 120 Cong. Rec. 3049.

(*Footnote continued*)

Moreover, in the case of contract markets an implied right to recover unlimited damages in a private civil

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The majority also errs in assuming that the first sentence of the second paragraph indicates that Congress approved private rights of action. That sentence refers to the "savings clause" added by Congress to the exclusive jurisdiction provision. Congress added that clause not to approve private rights of action but rather to insure that the exclusive jurisdiction granted to the CFTC would not interfere with federal court jurisdiction over such matters as antitrust suits and enforcement actions taken by other regulatory agencies or with state court jurisdiction over contract and common law claims. Senator Talmadge's later comments about the jurisdictional provision are fully consistent with that view. He further stated in pertinent part:

> "In addition, the conferees wished to make clear that nothing in the Act would supersede or limit the jurisdiction presently conferred on courts of the United States or any state. This Act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the Commodity Futures Trading Commission. Congress was aware that there have been ongoing efforts by various state and federal regulators to prevent some of these abuses. Accordingly, section 412 was included in the bill to make clear that all pending proceedings, including ongoing investigations, as well as court proceedings, should continue unabated by any provision of the Act. This also is necessary in order to prevent the creation of any regulatory gaps, particularly during the time between the adoption of this legislation and the full implementation of its provisions by the Commodity Futures Trading Commission. During the course of our deliberations, we learned, for example, that the SEC has a number of such matters currently under investigation. We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this Act." 120 Cong. Rec. 34997 (Oct. 10, 1974).

Though the majority reads this language as approval of private rights of action, the paragraph read as a whole belies that interpretation. Nothing in the language even remotely refers to private rights of action. Instead, Senator Talmadge was focusing exclusively on the effect of the provision for exclusive jurisdiction on existing court actions brought by various regulatory agencies.

Thus, the second paragraph of Senator Talmadge's September 9, 1974, statement is easily explained. Given the grant of exclusive jurisdiction to the CFTC, it was indeed hoped that the load on the courts would be lightened. Yet, Senator Talmadge was also aware

action against such markets would be inconsistent with express limitations placed by Congress on the amount of civil penalties that might be assessed against a contract market: (1) a limitation of $100,000, and (2) an amount which will not "materially impair the contract market's ability to carry on its operations and duties," § 6b of Act, 7 U.S.C. § 13a.[20]

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that Congress did not intend to relieve the federal courts of the burden of hearing appeals of the reparations proceeding as well as antitrust and regulatory matters or to relieve the state courts of hearing contract and common law matters.

20 Moreover, when Congress in 1978 authorized states to bring actions in the federal courts either in law or equity or both against those who violate the Act, § 6d of the Act, 7 U.S.C. § 13a-2, it expressly exempted contract markets and floor brokers from liability, thus indicating an intent to lodge primary responsibility for the enforcement of the Act with the CFTC and to insulate contract markets and floor brokers from the large damage suits that arise out of private suits, including *parens patriae* suits. The majority argues that contract markets were excluded only because Congress was concerned about off-market abuses. I disagree. While Congress may well have been concerned about off-market abuses, the legislative history clearly demonstrates that Congress exempted contract markets not because of its concern about off-contract market abuses but because it desired the CFTC to retain exclusive jurisdiction over those markets in order to guarantee national uniformity in the development of standards governing commodity futures trading. Contrary to the majority's suggestion (footnote 35) there is a difference between the award of damages under § 14 and an award of damages in a private civil suit. In enacting the former, Congress may well have intended the CFTC in the first instance to develop some guidelines for the award of damages which would minimize the likelihood of inconsistent awards popping up around the country, as often happens in private civil suits.

The House Report, for example, stated "the Commission should continue to have sole authority for the creation of a nationally uniform body of standards governing activities relating to commodity futures trading," H.R. Rep. 95-1181, *supra*, at 14, and that with respect to § 6d "The power to enforce the requirements of the Act with respect to the organized exchanges remains solely with the Commission." *Id.* at 14. The Report concluded:

"The Committee views the creation of these rights of action in the States as a necessary supplement to the Commission's enforce-

Congress' complete failure to approve, much less to authorize, private rights of action when it exhaustively

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ment activities. In the event of a State suit, the Commission could intervene in the action or institute its own administrative disciplinary proceeding, or both, as would be the case if the Commission had initiated the action in Federal court." *Id.* at 14.

To insure that such actions would not proceed without the opportunity for CFTC involvement, Congress specifically required the States upon instituting any suit under § 6d to notify the CFTC and gave the CFTC the right to intervene. § 6d(2). The importance to Congress of assuring a nationally uniform body of standards is further emphasized by its refusal to permit the States to bring actions in State courts under State statutes identical to the Commodity Exchange Act. "The committee was concerned that, despite safeguards in the Act, the possibility existed that in time there would be separate bodies of State court decisions among the various States that would cause confusion and disruption among the regulated persons." *Id.* at 16.

The legislative history in the Senate, moreover, reinforces the view that Congress desired the CFTC to retain exclusive jurisdiction over contract markets. The Senate Report reads with respect to § 6d:

> "This authority is subject to the qualification that such State actions may not be brought against a contract market or floor broker designated or registered as such with the Commission. The intent of the section is to provide States with the tools to combat fraudulent and other unlawful activity directed at their residents. Plenary authority to register, regulate, and, discipline the contract markets and the 'locals' whose activities are generally of the character of pit trading rather than customer contact is reserved to the Commission." S. Rep. No. 95-850, *supra* at 27.

So concerned was the Senate Committee that the "body of decisional law developed under this section [§ 6d] would be coherent and consistent with national policy" that it required any State proceeding under § 6d to obtain approval from the CFTC, *id.* at 26, though the Senate later amended that section, requiring instead the notification procedure mentioned just above. Confirming the view that § 6d was a specific and limited exception to the general rule of CFTC exclusive jurisdiction, Senator Bellmon explained on the Senate floor why contract markets and brokers were excluded: "The Federal preemption doctrine has merit regarding the regulation of commodity markets and brokers. However, there is no justification for tying the hands of the States when they wish to stop fraudulent practices occurring within their borders." 124 Cong. Rec. S10561 (July 12, 1978). Contrary to the majority's suggestion (opinion, p. 63), the identity of the plaintiff in such action is quite relevant. In

analyzed, overhauled and amended the enforcement provisions of the Act refutes the majority's claim that it somehow or other affirmatively intended such rights to continue as a supplement to the battery of enforcement weapons provided by it. Had it desired or intended this, the logical and natural procedure would have been for it to say so. *SEC v. Sloan*, 436 U.S. 103, 122 (1977). No court has ever imposed on Congress the contrary duty, which the majority urges, of expressly stating that the remedies provided by it are exclusive.

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order to assure national uniformity, Congress permitted only the CTFC or the States, under limited circumstances, to bring suit, not private individuals.

In light of Congress' cautious and careful approach to *parens patriae* suits under § 6d, including the insulation of contract markets from those suits, it would be anomalous for Congress to have approved private suits against contract markets and floor brokers. It is unlikely that Congress would have required States to notify CFTC of any action brought under § 6d while at the same time permitting private suits to blossom all over the country without the CFTC's knowledge. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 419, 420-21 n.13 (1974) ("anomalous for Congress to have centralized SEC suits [against the SIPC] for the apparent convenience of the SIPC while exposing the corporation to substantively identical suits by investors 'in any court, State or Federal' ").

The majority's reliance on the statement of Senator Leahy to the effect that contract markets were exempted from § 6d, in part because of the deterrent effect of private suits, 124 Cong. Rec. S16527 (Sept. 28, 1978), is misplaced. Since Congress was well aware by 1978 that the lower courts had begun to deny private rights of action under the Act, 124 Cong. Rec. S10537 (July 12, 1978) (Statement of Senator Huddleston), Senator Leahy's statement must be characterized as a hope and a prayer. Moreover, the explanation rings hollow since it would apply equally well to those traders subject to *parens patriae* suits who, under the view adopted by Senator Leahy at least, were also subject to private causes of action. Had Congress in fact believed that traders and contract markets were subject to private rights of action, it would have been far less likely to enact a *parens patriae* provision subjecting traders to suit by the States. Nor would it have been as concerned as it was about exempting contract markets from those suits.

Jurisdictional Provisions

The majority next contends that the "savings clause" incorporated into the jurisdictional provision, § 2 of the Act, 7 U.S.C. § 2 (§ 201 in the enacted bill), explicitly preserves the private right of action implied by the lower courts. Section 201 originated in H.R. 13113 and as passed by the House it read:

> "Provided, That the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market: And provided further, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States."

During the Senate hearings Rep. Rodino, Chairman of the House Committee on the Judiciary, criticized the provision not on the grounds that it might eliminate private rights of action but rather because the provision might be interpreted as eliminating the jurisdiction of state courts over contract claims and the jurisdiction of federal courts over antitrust claims and suits seeking review of administrative hearings. His comments are

set forth in full in the margin.[21] He accordingly suggested the addition of a proviso to the effect that federal courts should not be ousted of their jurisdiction. As a result the following proviso was enacted:

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21 Chairman Rodino's statement reads in relevant part:

"This double proviso could be construed to raise a question of federal pre-emption of the commodity futures industry and, therefore, unnecessarily raises a question of federal-State relationships. Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption . . .

"In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. The first proviso confers 'exclusive jurisdiction' on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provision: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Arguably, too, if jurisdiction of federal courts were to be withdrawn also, the Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.

"If it appears advisable to retain rather than to delete the double proviso of Section 201(B) of H.R. 13113, it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions. In this regard, the second proviso could be amended to provide:

"And provided further, that Nothing therein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities and on federal court. . . " Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S 2578, S. 2837 and H.R. 13113, *supra*, at 259-60.

> *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

Other witnesses reiterated Chairman Rodino's criticisms without any reference to private rights of action. Mr. Keith Clearwater, Deputy Assistant Attorney General, Dept. of Justice, for example, stated: "There are two problems with this language. It could be interpreted to deprive the Federal Courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce contract and commercial law rights." Commodity Futures Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113, *supra*, at 663. See Statements of James T. Halverson, Director of Bureau of Competition, Federal Trade Commission, *id.* at 667-68, and Statement of Glenn Willet Clark, Professor of Law, Drake University Law School, *id.* at 683-84.

The majority's contention that the "savings clause" explicitly preserves a private right of action rests solely on the comment of Senator Clark, while urging the Senate to authorize private treble damage suits, that "Unfortunately, the House bill does not authorize them,

but section 201 of that bill may prohibit all court actions. The staff has said that this was done inadvertently and they hope it can be corrected in the Senate." *Id.* at 205.

This "passing reference" by a "single legislator" is a slim reed on which to find congressional approval of a private right of action. *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 48 U.S.L.W. at 4662; *Piper v. Chris-Craft Industries, Inc., supra,* 430 U.S. at 31-32; *Chrysler Corp. v. Brown, supra,* 441 U.S. at 311; see *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 204 n.24 (1976). Senator Clark's concern that the House provision might prohibit "court actions" could well have been intended to refer to actions arising out of commodity contract claims. Moreover, applying the principles of *Chrysler Corp.*, his statement must be considered with the Reports of both Houses and the statements of other witnesses and Congressmen, all of which refute the majority's contention that there is a link between the jurisdictional provision of § 201 and Congress' attitude toward private rights of action.

Given the reasons expressly advanced by Chairman Rodino and given that no witness indicated that the revision of § 201 was intended to preserve or even affect any private rights of action in federal courts, the evidence is overwhelming that Congress simply took up the task of correcting the problem noted by Chairman Rodino and others and had no intention of approving a private damage action. Had Congress intended to preserve jurisdiction of the federal courts over private suits it could easily have said so, as it did in § 6c when it granted federal jurisdiction to hear CFTC-initiated injunctive suits, and in § 14(f) when it provided for such jurisdiction to enforce judgments arising out of reparations proceedings.

The Act does not have any counterpart to the jurisdictional provision of § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which affirmatively grants to federal courts exclusive jurisdiction of violations of the Act and of its regulations and authorizes civil suits to be brought in the district where the defendant is found or resides. In any event the "savings clause" here, which was directed exclusively to jurisdictional matters, could not preserve private damage actions, since jurisdictional provisions cannot create such rights, *Redington, supra,* 442 U.S. at 577. "The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [Act] which they seek to enforce, not in the jurisdictional provision." *Id.* at 577 (citing cases).

The 1978 Amendments

Finally, although subsequent legislation is of very limited weight in ascertaining Congress' intent in enacting earlier laws, *Transamerica, supra,* 100 S. Ct. at 248 n.13, the 1978 amendments are revealing. First, Congress did not provide expressly for a private right of action against merchants and exchanges despite its awareness that the lower courts had begun to deny private rights of action under the Act,[22] a situation

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22 The following cases, in addition to Judge MacMahon's opinion in this case, 470 F. Supp. 1256, have refused to imply a private cause of action under the Commodity Exchange Act: *Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976), *affd. on other grounds*, 571 F.2d 437 (8th Cir. 1978); *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 477 (D. Ohio 1976); *Bartels v. International Commodites Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Berman v. Bache Halsey Stuart, Shields, Inc.*, 467 F. Supp. 311 (S.D. Ohio 1979); *Alkan v. Rosenthal & Co.*, CCH Comm. Fut. L. Rep. Par. 20,797 (S.D. Ohio 1979); *Liang v. Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979); *Fischer v. Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979); *Stone v. Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980).

which Sen. Huddleston on the floor of the Senate deemed "unfortunate." 124 Cong. Rec. 10537 (July 12, 1978). Instead, Congress proposed to alleviate the heavy burden on the reparations procedure caused by the failure of lower courts to imply private rights of action not by amending the Act to allow private suits, as we would expect if it had approved of private suits, but rather by eliminating the hearing requirement for reparations claims under $5,000. § 14(b), 7 U.S.C. § 18(b).

The failure of Congress to amend the Act is particularly significant in light of its awareness by that time of the Supreme Court's recent but well publicized adoption of somewhat stricter principles governing the implication of private causes of action. See *Amtrak*, 414 U.S. 453 (1974); *Cort v. Ash*, 422 U.S. 66 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[23]

Second, Congress in 1978 received testimony from the states that they were uncertain, in light of various adverse court decisions, about their ability to bring *parens patriae* suits for violations of the Act and to enforce their own contract and consumer fraud statutes. In sharp contrast to its 1974 refusal to authorize private suits, Congress expressly empowered the states to bring suits in federal courts to enjoin violations of the Act or to obtain monetary damages.

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[23] The majority responds that Congress' omission is not significant, reasoning that Congress could not have been aware in 1978 of the Supreme Court's retreat from a liberal view of implied rights of action. But, as the Court recognized in *Cannon*, *supra*, 442 U.S. at 698, *Cort v. Ash* and other cases decided prior to 1978 had signaled a stricter approach.

§ 6d, 7 U.S.C. § 13a-2, and expressly confirmed the ability of the states to enforce their contract and consumer fraud law. § 6d(5), 7 U.S.C. § 13a-2(5). Quite apart from the fact that Congress' express exemption of contract markets and floor brokers from liability under § 6d suggests a desire to insulate those participants from private damage liability,[24] the adoption of § 6d is a clear indication that "Congress knew how to confer a private right of action when it wished to do so." *Transamerica, supra*, 100 S. Ct. 248 at n.13. Moreover, Congress recognized that express authorization for such suits was necessary if a right under the Act to institute such litigation was to exist:

> "Section 12 specifically authorizes the States to investigate or prosecute in a civil action violations of the Act. . . . Any such action must be brought in the proper Federal district court, and the Commission is given the right to intervene in the action as a party. *This is a new right since States currently have no such express authority under the Act.*" H.R. Rep. No. 95-1181, *supra*, at 28.

This statement is strong evidence that when Congress intended to create a right of action under the Act it did so expressly, not by implication.[25]

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24 See *supra* note 20.

25 Equally telling is the complete absence of any mention of a private right of action in the exhaustive Senate and House Committee Reports on the 1978 amendments, which purported to list all of the private remedies available under the Act. S. Rep. No. 95-850, *supra*, at 12-13; H.R. Rep. No. 95-1181, *supra*, (158 pages discussing the Act, its history and its enforcement provisions without a mention of private rights of action). This conspicuous omission suggests, of course, that Congress did not believe a private right of action to be available.

The Theory that Congressional Silence Amounts to Congressional Approval

Lacking any substantial support in the language or legislative history of the Act that Congress affirmatively approved private rights of action, the majority's position boils down to the theory that Congress must have been aware generally of a few lower federal court decisions implying a private right under the Act as it stood prior to 1974 and therefore found express approval of private rights unnecessary. But bearing in mind that "[i]mplying a private cause of action on the basis of Congressional silence is a hazardous enterprise, at best," *Redington, supra,* 442 U.S. at 571, any leap from congressional silence to congressional approval must be made cautiously, if at all. Moreover, it is inappropriate to rely on the presumption asserted by the majority where, as here, Congress has expressly created a number of remedies which may reasonably be viewed as exclusive and where, if Congress intended to adopt a prior judicial interpretation providing for an additional remedy, it would have said so. Finally, the body of earlier lower federal court decisional law provides a wholly inadequate basis, either in terms of relevance, weight, period of existence, or notoriety, for such an inference.

In *T.I.M.E. v. United States, supra,* 359 U.S. 464, the Court expressly rejected the position advanced by the majority here. There a shipper of goods contended that it had a private cause of action under the Motor Carrier Act to recover unreasonable rates charged by a carrier in violation of the Act. After rejecting the contention that the Act granted a private right of action, in part because, as here, Congress specifically declined to enact a proposed cause of action, the Court rejected the claim

that the Act must be read as preserving a pre-existing common-law or judicially implied right of action.

> "The Government is able to point to only two cases in addition to the present ones, in the 24 years since passage of the Motor Carrier Act, in which courts have appeared to assume that the issue of reasonableness of past motor carrier rates was litigable, and in neither of these cases was the question given other than the most cursory attention. Under these circumstances the issue before us cannot fairly be said to be foreclosed by long-standing interpretation and understanding.
>
> "We are told that Congress has long been aware that the Commission was of the view that a common-law action for recovery of unreasonable rates paid to a motor carrier, with referral to the Commission of the issue of unreasonableness, would lie, and that its failure to legislate in derogation of this view implied an approval and acceptance of it. But it appears that each time the Commission's views in this regard were communicated to committees of Congress, it was in connection with a request by the Commission for legislation which would have given to shippers a cause of action under the statute and granted to the Commission the authority to award reparations, and each time that request was rejected. . . . *[W]e do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.*" 359 U.S. at 478. (Emphasis added).

The few decisions relied upon by the majority are consistent with the foregoing, since they involved exceptionally long periods of continuous construction and not, as here, an interpretation by a lower federal court, the Seventh Circuit in *Deaktor*, less than a year old. In *Blue Chip Stamps v. Manor Drug Stores, supra*, 421 U.S. at 733, the Court found that a *24-year old* acceptance by the lower courts of an interpretation of §10(b) limiting the cause of action to purchasers of securities, coupled with the failure of Congress to reject that interpretation, despite the Securities and Exchange Commission's repeated urging, "argues significantly in favor of acceptance" of that interpretation. In *Cannon, supra*, 441 U.S. 677, the Court, in implying a cause of action under Title IX of the Education Amendments of 1972, noted that Congress intended to create remedies under Title IX similar to those available under Title VI and found that Congress understood that the courts had implied a right of action for plaintiffs under Title VI. The Court, however, specifically disclaimed reliance on the presumption used by the majority here—that the private right of action must be presumed to exist unless expressly repealed by Congress—and instead rested its decision on what it considered to be Congress' affirmative intent to create a private right of action. *Id.* at 699.

Similarly in *SEC v. Sloan, supra*, 436 U.S. 103, the Court rejected the argument that Congress should be presumed to have approved a long-standing administrative construction of a statute despite Congress' re-enactment of the statute without disapproval of the interpretation and the fact that on at least one occasion the relevant Senate Committee indicated that it understood and approved the interpretation. The Court

noted that "we are extremely reluctant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this." *Id.* at 121. The Court concluded that if Congress intended to approve the prior interpretation it could have and would have said so. This principle applies with equal force in the present case.

The cases cited by the majority are not to the contrary. In *Lorillard v. Pons*, 434 U.S. 575 (1978), the Court found that Congress, in enacting the Age Discrimination Employment Act (ADEA) and in incorporating a number of provisions from the Fair Labor Standards Act (FLSA), intended to adopt the judicial construction of those provisions. The Court noted that because Congress exhibited a detailed knowledge of the FLSA provisions and their interpretations and a willingness to depart from those interpretations with which it disagreed, it was fair to presume that, but for the changes made in the FLSA provisions, Congress intended to incorporate fully all other remedies and interpretations of the FLSA. This is quite different from the situation in the present case where the references to the prior judicial interpretation are few and far between in the legislative history and where Congress dos not exhibit detailed knowledge of that interpretation.

Reliance on *Georgia v. United States*, 411 U.S. 526 (1978), is similarly misplaced. The Court found congressional acquiescence in a prior Supreme Court

decision to be persuasive only after noting that the decision was repeatedly discussed by members of Congress. Indeed, discussion of the decision took up approximately 73 pages in the House Hearings and 10 in the Senate, *id.* at 533 n.5.[26]

All of these authorities are a far cry from the inference as to congressional intent which we are asked to draw in this case. As in *SEC v. Sloan*, reliance is placed on a few scattered undefinitive and conclusory references in thousands of pages of legislative history rather than upon repeated detailed reference to any identified Supreme Court decisions, such as existed in *Georgia*. Unlike the 25-year history of interpretation of § 10(b), with which the Supreme Court was faced in *Superintendent of Insurance* and *Blue Chip Stamps*, we find a brief line of lower court decisions, none of which are relevant to the issues before us except one, decided *only one year* before the 1974 amendments, *Deaktor*, knowledge of which by Congress cannot be presumed. This hardly constitutes a long-standing and well-recognized prior judicial interpretation sufficient to invoke the dubious presumption relied on by the majority here. The silence of the 1975 Congress when it amended the Securities Exchange Act (see majority

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26 The other cases cited by the majority are likewise easily distinguishable. In the first place, none of them involves private rights of action and we have been instructed by the Supreme Court to go slow in inferring that Congress by its silence intended to approve a private right of action. *Redington, supra*, 442 U.S. at 571. Second, the cases all involve situations where the prior judicial interpretation is far more longstanding and pervasive than the one year old history of *Deaktor* here, see, e.g., *Van Franken v. Helvering*, 115 F.2d 709 (2d Cir. 1940), *cert. denied*, 313 U.S. 585 (1941), and *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5 (1930), or where, unlike the situation here, there have been numerous specific references in the legislative history to the prior interpretation. *Bennett v. Panama Canal Co.*, 475 F.2d 1280 (D.C. Cir. 1973).

opinion, *supra*, p. 33) in the face of *Supreme Court decisions* (e.g., *Superintendent of Insurance* and *Blue Chip Stamps* upholding implied rights of action) is quite different from silence in the face of *one lower court decision (Deaktor)*, of which it may not even have had knowledge. No court has yet found a private cause of action based on §§ 5d, 5a(8) or 4a of the Act, which are invoked on this appeal.

Lastly, since it is abundantly clear that the few pre-1974 decisions were erroneous, being based on the theory of tort rather than congressional intent, it is unreasonable to suppose that Congress, absent a Supreme Court ruling, intended to compound the error by tacitly giving effect to them. Cf. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978); *SEC v. Sloan, supra*, 436 U.S. at 116 (holding that the interpretations of an administrative agency as to its statutory authorization is entitled to deference only when thoroughly and soundly reasoned). By 1974 the Supreme Court with its decision in *Amtrak* had signaled a somewhat stricter approach to the implication of private rights of action, putting Congress on notice that the basic principles of construction by which private rights were to be implied was not yet finally settled.

In the last analysis the majority substitutes sheer speculation based on unsupportable presumptions for reasonable evidence of Congress' contrary intent. The issue was squarely presented to Congress in 1974 but it failed to approve an express right of action much less indicate in a long legislative history any approval of an implied one. "We are not obliged to indulge Congress in its refusal to confront the hard questions of private rights of action," *Cannon, supra*, 441 U.S. at 743 n.14

(Powell, J., dissenting). Under these circumstances, absent some expression of approval by Congress, formal or informal, I believe we should not imply an intent on its part to create an implied right of action. Under these circumstances, creation of a private right rests with Congress, not the judiciary.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July, one thousand nine hundred and eighty.

79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & Co., et al.,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES INC., *et al.*,

Defendants-Appellees.

Present:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. AMALYA L. KEARSE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. Daniel Fusaro, *Clerk*

By: /s/ Arthur Heller
Arthur Heller
Deputy Clerk

Order Denying Petition for Rehearing of New York Mercantile Exchange, *et al.*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

PRESENT:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. AMALYA L. KEARSE,

Circuit Judges.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, *et al.*,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

THE NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO., & HAROLD COLLINS,

Defendants,

THE NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

79-7482

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

HEINOLD COMMODITIES, INC., and THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendants-appellees New York Mercantile Exchange, Levine, Gabler & Pennisi,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing of Heinold Commodities, Inc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

PRESENT:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. AMALYA L. KEARSE,

Circuit Judges.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees,

79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

THE NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO., & HAROLD COLLINS,

Defendants,

THE NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

79-7482

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.

Defendants,

HEINOLD COMMODITIES, INC., and THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee Heinold Commodities, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,

Clerk

Order Denying Petition for Rehearing of Clayton Brokerage Co. of St. Louis, Inc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

PRESENT HON. HENRY J. FRIENDLY
HON. WALTER R. MANSFIELD
HON. AMALYA L. KEARSE
Circuit Judges

79-7402

Neil Leist, Philip Smith and Incomco,
Plaintiffs-Appellants

-against-

John Richard Simplot, et al.
Defendants

Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi,
Defendants-Appellees

79-7464

Incomco,
Plaintiff-Appellant

-against-

The New York Mercantile Exchange, Wayne County Produce Co., & Harold Collins,
Defendants

The New York Mercantile Exchange,
Defendant-Appellee

79-7482

National Super Spuds, Inc., William R. Buster, Jr., Willard C. Shiner, Eugene P. Weisman, Richard Welts, Raymond Rothberg, Arthur S. Armstrong, Theodore Brinek, Capgain Holdings, Inc., and Heiz Romminger, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants

-against

New York Mercantile Exchange, et al.
Defendants

Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.,
Defendants-Appellees

A petition for a rehearing having been filed herein by counsel for the defendant-appellee Clayton Brokerage Co. of St. Louis, Inc.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

Order Denying Petition for Rehearing With a Suggestion for Rehearing In Banc of New York Mercantile Exchange, *et al.*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

THE NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO., & HAROLD COLLINS,

Defendants,

THE NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

79-7482

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

HEINOLD COMMODITIES, INC., and THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by

counsel for the defendants-appellees New York Mercantile Exchange, Levine, Gabler & Pennisi,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ WILFRED FEINBERG
WILFRED FEINBERG
Chief Judge

Order Denying Petition for Rehearing With a Suggestion for Rehearing En Banc of Heinold Commodities, Inc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

THE NEW YORK MERCANTILE EXCHANGE, WAYNE COUNTY PRODUCE CO, & HAROLD COLLINS,

Defendants,

THE NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

79-7482

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTER, JR., WILLARD C. SHINER, EUGENE P. WEISMAN, RICHARD WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMSTRONG, THEODORE BRINEK, CAPGAIN HOLDINGS, INC., and HEIZ ROMMINGER, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.

Defendants,

HEINOLD COMMODITIES, INC., and THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellee, Heinold Commodities, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

WILFRED FEINBERG

Chief Judge

Order Denying Petition for Rehearing With a Suggestion for Rehearing En Banc of Clayton Brokerage Co. of St. Louis, Inc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty.

79-7402

Neil Leist, Philip Smith and Incomco,
Plaintiffs-Appellants

-against-

John Richard Simplot, et al.
Defendants

Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi,
Defendants-Appellees

79-7464

Incomco,
Plaintiff-Appellant

-against-

The New York Mercantile Exchange, Wayne County Produce Co., & Harold Collins,
Defendants

The New York Mercantile Exchange,
Defendant-Appellee

79-7482

National Super Spuds, Inc., William R. Buster, Jr., Willard C. Shiner, Eugene P. Weisman, Richard Welts, Raymond Rothberg, Arthur S. Armstrong, Theodore Brinek, Capgain Holdings, Inc., and Heiz Romminger, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants

-against

New York Mercantile Exchange, et al.
Defendants

Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.,
Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellee Clayton Brokerage Co. of St. Louis, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

Wilfred Feniling
Chief Judge

Nos. 80-757, 80-895, 80-936

Supreme Court, U. S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-757

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-895

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-936

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD TOBOROFF
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Counsel for Respondents

Of Counsel:

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(212) 832-2310

MARC D. STERN

RESPONDENTS'* COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1) Whether a private cause of action exists under the Commodity Exchange Act for persons victimized by violations of that act by both registered and non-registered persons acting in concert?

2) Whether a private cause of action exists against a contract market which fails to prevent broad market manipulations by both registered and non-registered persons?

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* None of the respondents in these cases need make any statement pursuant to Rule 28(1).

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by petitioners, the following provision is involved:

> § 2(a)(1), 7 U.S.C. § 2:
>
> Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State.

STATEMENT OF THE CASE

Petitioners'[1] statements of the case are accurate, as far as they go. However, a few additional facts are nonetheless necessary to put the issues before the Court into perspective.

---

[1] By permission obtained from this Court's Clerk's office granted orally in a telephone conversation on December 31, 1980, respondents are filing one response to all of the petitions for certiorari in New York Mercantile Exchange v. Leist, (hereinafter "Exchange") No. 80-757, Clayton Brokerage Co. of St. Louis, Inc. v. Leist (hereinafter "Clayton") No. 80-895, and Heinold Commodities, Inc. et al. v. Leist (hereinafter "Heinold") No. 80-936.

Respondents dealt directly with each of petitioners-brokers, but they "are not," in the words of Judge Friendly, "complaining about the handling of their accounts but rather of broad market manipulation." (A-70, n.35).[2]

The prime movers in this scheme were J.R. Simplot (hereinafter "Simplot") and P.J. Taggares (hereinafter "Taggares")[3] who are "persons" not registered with the CFTC. Simplot was fined $90,000 by the Commodity Futures Trading Commission (hereinafter "CFTC") and prohibited from trading in futures contracts for six years

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[2] Page references are to the Appendices to the petitions for writ of certiorari, No. 80-757, No. 80-895 and No. 80-936. Since all bear the same pagination, all references are simply to "A_____." References to the Joint Appendix to the Supplemental Briefs are cited as "JA____."

[3] Simplot and Taggares are the two largest potato processors in the United States, using well over 35 million hundredweight of potatoes annually or about 50% of the nation's yearly harvest. Simplot and Taggares had virtually destroyed the Idaho potato contract on the Chicago Mercantile Exchange in 1971 using methods similar to those they employed with the Maine potato contract on petitioner Exchange in 1976 - the subject at bar.

and Taggares was fined $15,000 by the CFTC and barred from trading in futures contracts for four years as a result of their manipulation of the potato futures market (A-108,n.2). (Mansfield, J. dissenting) All of respondents' claims for relief are asserted against Simplot and Taggares as well as the petitioners-brokers.

It is therefore surprising - but, as we show, readily explainable - that all petitioners carefully avoid discussion of Simplot and Taggares, the non-registered persons who conspired with petitioners-brokers to manipulate the 1976 Maine potato futures contract market.

Simplot and Taggares did not join in the motion to dismiss made by the petitioners, and have not sought review in this court. As Judge Friendly observed (A-67), although "probably the principal defendants[,] in these actions . . . they [Simplot and Taggares] have understandably chosen to stay in the background in the present argument . . ."

Petitioner Exchange has assessed hundreds of thousands of dollars in penalties against the petitioners-brokers for their failure to comply with Exchange Rules. The brokers were indemnified by

Simplot and Taggares for these fines pursuant to a written agreement.

As of the writing of the opinion below, the CFTC was continuing its investigation of the manipulation of the 1976 Maine potato futures market. (A-108 n.2)(Mansfield, J. dissenting).

SUMMARY OF ARGUMENT

The Court should deny all three petitions for writs of certiorari in these cases because:

1) This case is not in a proper posture for review. Defendants Simplot and Taggares, both "non-registered persons", decided not to participate in the motion to dismiss made in the District Court, and they did not participate in the appeal, nor as yet, in the review process at bar. They are, therefore, not before this Court. In their absence, this Court cannot resolve all of the questions about private rights of action arising under the Commodity Exchange Act (hereinafter "CEA") 7 U.S.C. § 1 et seq.

2) The majority opinion below correctly found the existence of a private right of action under the CEA after a careful analysis of this Court's recent decisions and the legislative history. To begin with, this Court has not barred all implication of remedies and there is thus no conflict merely because the Court below implied such a remedy. The legislative history as a whole shows that Congress in 1974 knew that private causes of action

existed under the CEA, and that Congress assumed that this interpretation of the CEA would continue. Congress made changes in the statute reflecting this understanding and, indeed, included language designed to protect private causes of action. Elimination of the cause of action in commodities cases, but not securities cases, would destroy the symmetry Congress created between the two.

3) The dire consequences predicted by the petitioners if the decision below is permitted to stand are not supported by the experience of the courts to date. The cases which have been brought until now are not strike suits, but are brought to the courts because of inadequacies in the agency enforcement process.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE PRINCIPAL DEFENDANTS ARE NOT BEFORE THIS COURT

As Judge Friendly noted (A-67), "the principal defendants" in this case are not the petitioners, but Simplot and Taggares who illegally manipulated the 1976 Maine potato futures market for their own pecuniary advantage. They nevertheless did not join in the motion to dismiss but "stayed in the background" (A-67), despite their obvious interest in that motion. Whether or not by agreement with the petitioners, Simplot and Taggares are thus not before this Court. As a result of their decision, as Judge Mansfield conceded in dissent (A-109, n.3), a determination that no cause of action exists against the petitioners would not resolve the question of the liability of Simplot and Taggares under the CEA, particularly because, as non-registered persons, § 4d, 7 U.S.C. § 6d and § 4e, 7 U.S.C. § 6e, they are not subject to the reparations procedure provided for in § 14, 7 U.S.C. § 18.

Hence a judgment in favor of the petitioners would only require the District Court, and subsequently the Court of Appeals and this Court, to undertake the implication analysis once again. Simplot and Taggares should not be permitted, by their refusal to participate in the orderly resolution of this case in this Court at this time to impose that heavy burden on the courts and on the respondents. Because of Simplot's and Taggares' actions this case is not in an appropriate posture for review, and for this reason, the writs of certiorari should be denied.

A denial of certiorari in these cases would not cause any delays which would unfairly benefit respondents, who are seeking a recovery for sums lost in what has been rightly termed the "notorious Maine potato futures default," Wachovia Bank and Trust Company v. National Student Marketing Corp., ___F.2d ___, [Current] Fed. Sec. L. Rep. (CCH) ¶97,712 at p.98, 736 (D.C. Cir. 1980) (hereinafter "Wachovia").

As the motion for partial summary judgment was made on the eve of trial, should this Court deny certiorari, a trial could be held promptly. If a trial results in a judgment for respondents on their claims under the CEA, the petitioners, Simplot and Taggares would be free to seek, after an appeal to the Second Circuit, review in this Court. At that time, all of the questions about implied causes of action under the CEA present in this case could be considered.

II. THE COURT BELOW CORRECTLY APPLIED THIS COURT'S DECISIONS TO THE CEA

A. No Conflict Is Created Merely Because A Private Cause Of Action Was Implied By The Second Circuit.

The crux of the petitions for certiorari is that the decision below "conflicts in principle with the decisions in this Court", petition of Exchange, No. 80-757 at 9; petition of Clayton, No. 80-895 at 8; petition of Heinold, No. 80-936 at 11. As a second reason for granting the writ petitioners point to the conflict between the decision below and that of the Fifth Circuit in Rivers v. Rosenthal & Co., _____ F.2d _____, No. 79-1313 (5th Cir., December 16, 1980), reproduced in the Joint Appendix to the Supplemental Briefs in support of the petitions for writs of certiorari. As we demonstrate in Point I, supra, this case is not an appropriate vehicle for resolution of that conflict. In any event it is respectfully submitted that it is Rivers v. Rosenthal & Co., supra, not this case which is incorrectly decided, and which merits review by this Court.

Neither the court below, nor the Sixth Circuit in Curran v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), petition for certiorari pending, No. 80-203, perceived any conflict between implying a private cause of action under the CEA and this Court's decisions.

Two other circuits have reached the same result since the 1974 amendments to the CEA. Both treated the issue as so simple and well settled as not to merit extensive discussion, Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Goldman, 593 F.2d 129 (8th Cir.) cert. den., 100 S.Ct. 76 (1979); Hirk v. Agri-Research Council, 561 F.2d 96 (7th Cir. 1977).

One other Circuit, albeit in dicta, has indicated its approval of Judge Friendly's reasoning and holding in this case. Wachovia, supra.[4]

A "conflict in principle" with this Court's decisions is not created because a majority - but not all - of this Court's

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[4] A majority of the District Courts that considered the question likewise found a private cause of action under the CEA; compare. The cases are collected in Judge Friendly's opinion (A-43,44 n.19).

recent and relevant decisions refused to imply a private cause of action under various federal statutes and the decision below did. Wachovia, supra, at p.98,736 This Court's decisions do not state a general rule against implying a private cause of action; As Judge Mikva put it, this "Court did not announce that it was going out of the business" of implying remedies from federal statutes. Wachovia, supra, at p. 98,732; Accord, Cannon v. University of Chicago, 441 U.S. 677 (1979) (hereinafter "Cannon"); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (hereinafter "Transamerica").

B. The Court Below Was Correct In Analyzing The Legislative History In Light Of What The Congress Thought In 1974.

This Court's cases, of course, do hold, as the Court below recognized, that whether a private cause of action is to be implied from a federal regulatory statute, is "basically a matter of statutory construction", Transamerica, supra, 444 U.S. at 15, although the three other factors enunciated in Cort v. Ash, 422 U.S. 66 (1975) must also be considered.

The necessary Congressional intent need not be explicit, but "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment". Transamerica, supra, 444 U.S. at 18. No doubt, in view of subsequent case law developments, it would have been preferable for Congress to have explicitly stated that it recognized the existence of a private cause of action under the CEA, but that is not the relevant inquiry. Cannon, supra, 441 U.S. at 718. (Rehnquist, J., concurring).

This Court's emphasis on the importance of Congressional intent in determining whether to imply a private cause of action, Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979), means that the legislative materials must be analyzed, not with hindsight, but, as the majority below recognized (A-45,46), in light of what Congress must have thought at the time. As the Fifth Circuit conceded in Rivers v. Rosenthal & Co., supra (JA-29):

> [T]he liberal judicial climate in which the CFTCA was born requires us to be more solicitous and sensitive to indications of Con-

> gress' desire to create a cause of action. Indeed, any indication that Congress actually intended merely to leave the question to the judiciary to be resolved according to its contemporary rules of construction, while clearly inadequate under current standards, would likely be sufficient to carry the day here.

C. Congressional Intent To Allow A Private Cause Of Action Appears Clearly In the Legislative History.

In the case of the CEA, however, there is far more than merely a Congressional intent to leave the matter to the judiciary. The legislative history affirmatively demonstrates a Congressional intent to allow private causes of action under the CEA. This intent appears from the explicit language of the act, and the circumstances surrounding the most recent amendments to it. Because these circumstances are particularly significant and because they are remarkably similar to the situation in Cannon, supra, we begin with them.

The 1974 revisions were embodied in P.L. 93-463, 88 Stat. 1389, which was described as "An Act to amend the Commodity Exchange Act to strengthen the regulation

of futures trading..."(emphasis added). In view of the recognition of private causes of action prior to 1974, it would be surprising if Congress, in enacting "An Act to Amend the Commodity Exchange Act to strengthen the regulation of futures trading" would sub silentio eliminate the private cause of action. It would be particularly surprising given the steady strengthening of the CEA since its enactment in the early 1920's.

There was no reason for Congress to doubt in 1974 that a private cause of action existed under the CEA as it then existed. All the lower Federal courts which had considered the question had so held (A-38,39). An expert witness testifying before Congressional committees considering the CEA amendments also advised Congress that a private right of action existed (A-61).

It matters not that petitioner Heinold, No. 80-936, in its petition for certiorari at 18-25, with the benefit of hindsight, suggests that all those cases which had implied a private cause of action were "wrongly" decided, or were "illegitimate" under the law governing the implication of remedies as it then stood.

Congress is not a super law review, which must pass on the correctness of court decisions before relying on them. Congress properly assumes that the decisions of a majority of the Federal courts are correct and represent an accurate exposition of the law. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." Cannon, supra, 441 U.S. at 711, citing Brown v General Services Administration, 425 U.S. 820, 828 (1976).

Congress did not rely on lower court decisions alone. Shortly before Congress began its consideration of the 1974 revisions, this Court, in Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973), although not passing directly on the existence of a private cause of action, could surely be understood as accepting the existence of a private cause of action. Cf. Cannon, supra, 441 U.S. at 702, n.33.

The decisions of this Court establish that, when Congress re-enacts a statute, it is entitled to assume that prior case law interpreting unchanged portions of the statutes will continue in force, Lorillard

v. Pons, 434 U.S. 575, 580-81 (1978). The Rivers court, while acknowledging the Lorillard rule, found that the CEA did not fit this pattern, because the 1974 amendments involved a wholesale revamping of the Act. As a result, it placed the burden on the plaintiff to prove that Congress, in 1974, took some affirmative step to create the private cause of action. But this approach cannot explain away the fact that § 4b, 7 U.S.C. § 6b, was left unchanged, and that nothing in the legislative history indicates that Congress (as opposed to industry spokesmen) wanted to change the law. Moreover, as we demonstrate infra at 13-14, Congress indeed manifested an intent to preserve prior case law.

Even more importantly, the major anti-fraud provision of the CEA, § 4(b), was modeled on § 10(b) of the 1934 Securities and Exchange Act. Private causes of action were firmly entrenched under the latter statute, J.I. Case Co. v Borak, 377 U.S. 426 (1964). Judge Friendly argued (A-34, n.14):

> "The 1936 amendments arose from an explicit concern to make protection in the commodities

> field as strong as it was in the securities field, lest the unscrupulous would simply transfer their operations from one market to another. H.R. Rep. No. 1522, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10446 (June 4, 1934) (Remarks of Chairman Jones of the House Committee on Agriculture); 79 Cong. Rec. 8589 (June 3, 1935) (same). ...Congress was not only aware of the implied right of action under the CEA in 1974 as shown below, but surely was also aware of the private right of action recognized in the analogous field of securities regulation.

See, also, Markham and Meltzer, Secondary Liability Under the Commodity Exchange Act, 27 Emory L.J. 1115 (1978); Note, Private Rights of Action for Commodity Futures Investors, 55 B.U.L. Rev. 804, 821-22 (1975).

D. The 1974 Amendments Are Comprehensible Only On The Assumption That A Private Cause Of Action Exists.

The 1974 revisions are comprehensible only if private causes of action are available under the CEA. In transferring

responsibility for administration of the CEA from the Department of Agriculture to the CFTC, Congress also made a major change in the regulatory authority vis-a-vis the commodity exchanges. Prior to 1974, the exchanges purportedly regulating commodity trading were required to enforce only those of their rules not disapproved by the Department of Agriculture.

In the wake of private damage suits under the CEA, the exchanges were failing, even refusing, to promulgate regulations imposing duties on themselves and brokers because such regulations served to establish standards of care against which their conduct was measured. The 1974 revisions dealt with this problem by requiring the exchanges to enforce all rules mandated by the CFTC, § 5a(8), 7 U.S.C. § 7a(8), (A-57).

Congress could have dealt with the exchanges' self-serving failure to self-regulate by eliminating private causes of action, as the exchanges urged (A-60, 61). Congress did not do so; instead it enacted provisions complementary to - indeed, premised on - the existence of private causes of action.

Only by ignoring this important aspect of the legislative history was the Fifth Circuit in Rivers v. Rosenthal & Co., supra, able to conclude that, in amending the CEA in 1974, Congress opted for centralized agency regulation of the commodities futures industry and therefore eliminated the private cause of action. Rivers notwithstanding, there is no inconsistency between centralized agency regulation and private causes of action. The legislative history of the provisions strengthening the regulatory authority of the CFTC over the exchanges makes clear that Congress perceived no conflict in strengthening governmental authority and permitting private causes of action. If this Court were now to eliminate the private cause of action it would destroy a vital enforcement technique Congress deemed essential to protect investors and the commodity markets. Such a result would be thoroughly at odds with the thrust of this Court's recent decisions - respect for the proper roles of the legislative and the judiciary.

E. Congress Included Specific Statutory Language Designed To Preserve Private Causes Of Action.

Moreover, unlike the statute involved in Transamerica, supra, Congress, in reenacting the CEA, included language designed to preserve the rights of private parties to such redress in the courts. Responding to objections that, as originally proposed, the provision granting the CFTC exclusive jurisdiction over commodity futures would have stripped the federal and state courts of jurisdiction over cases arising from commodity transactions, the Senate Committee added language, codified in § 2(a)(1), 7 U.S.C. § 2, specifically preserving that jurisdiction. Of course, that section preserves the court's jurisdiction in cases other than ones like the one at bar; it also unambiguously preserves private causes of action.

The CFTC, the agency charged with enforcement of the statute, interpreted these provisions as giving it exclusive authority vis-a-vis other federal and state agencies, but not as ousting the courts of jurisdiction over private causes

of action. That interpretation, is , of course, entitled to great deference. Infra, at 28.

Judge Mansfield, (A-92,93), relying on the expressio unius maxim of statutory construction, would read the reparations remedy, created in 1974, (§ 14, 7 U.S.C. § 18) and the criminal provisions of the Act, (§ 9, 7 U.S.C. § 13), as barring an implied judicial one. As we will demonstrate, the reparation remedy was not intended as the only remedy for violations of the CEA. Expressio unius, however, is only an aid to statutory interpretation, not an inflexible rule of law, Transamerica, supra; Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419-20 (1975); National Railroad Passenger Corp. v. National Assoc. Railroad Passengers, 414 U.S. 453, 458-61 (1974). It can be overcome by contrary evidence. Here, that contrary evidence included the provisions of § 2(a)(1), cited above, the change in the authority of the regulatory body and the frequent references in the legislative history to a private right of action (A-56).

F. Failing To Imply A Private Cause Of Action Would Frustrate The Congressional Scheme.

Under Cort v. Ash, supra, one of the questions which must be answered before a court may imply a remedy is whether a private remedy would interfere with the Congressional scheme, Cort v. Ash, supra, 422 U.S. at 78; National Railroad Passenger Corp. v. National Assoc. of Railroad Passengers, supra, 414 U.S. at 463. Not only is there no such conflict here, but a failure to permit the private cause of action would interfere with and seriously frustrate the Congressional scheme.

Congress originally enacted § 4(b) in 1936 in order to prevent swindlers who had previously engaged in stock frauds - recently prohibited by the Securities Act of 1933 and the Securities Exchange Act of 1934 - from moving into the commodities futures field. It therefore chose language identical with the broad prohibitory language which was so successful in reducing securities fraud. Any substantial difference between the two regulatory schemes would defeat this Congressional

purpose.[5] Over the years, both statutes were interpreted to permit private causes of action. For this Court to now eliminate the cause of action only under the CEA would undermine the Congressional intent to insure comparable investor protection under both acts.

G. Implying a Private Cause of Action Would Not Interfere with the Congressional Purpose.

The Petitioner Exchange and its officers argue that a private cause of action is inconsistent with the limitations on the financial sanctions that the CFTC can impose on exchanges under § 6b, 7 U.S.C., § 13a of the Act. Upon examination that argument fails.[6]

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[5] See discussion at pages 16-17 herein, supra, and Judge Friendly's fn. 14 (A-34).

[6] The Exchange suggests that, as a regulatory body, it is absolutely immune from damage suits. (No. 80-757 at 10). Unlike a government agency, which presumably acts on behalf of the public at large, the Exchange is organized by its members to advance their own business interests. Although perhaps not a profit making entity (Cf. New York Times, January 5, 1981 at p. D-1), it is governed by representatives of its members, who, it must be assumed, act to further their own interests.

The requirement that the CFTC consider an exchange's financial condition when imposing fines is consistent with the existence of private causes of action. Congress, concerned for the financial stability of the exchanges, and knowing that private suits could be brought, limited the power of the CFTC to impose penalties over and above compensatory damages which might be awarded for violations of the CEA. Moreover, the limitations are on a "per day", not "per incident" basis. Thus, even given the statutory limits, substantial fines can be imposed by the CFTC (A-29); they are however, only punitive and not remedial (A-70, n.35).

The Fifth Circuit found a conflict between a private cause of action and the Congressional decision to concentrate regulatory authority in the CFTC (JA-33, 34). It found that allowing for private causes of action would result in conflicting decisions under the CEA. Significantly, however, that section of the opinion makes no reference to Chicago Mercantile Exchange v. Deaktor, supra, in which this Court applied the doctrine of primary jurisdiction in a private lawsuit under the CEA as a means of avoiding precisely

this result.[7]

Finally, petitioners, on the most charitable reading of their motives, are not wholly disinterested in seeking to have the reparation remedy made exclusive. The CFTC reparations procedure is seriously backlogged, and the reparations section is not adequately staffed to handle the extra workload which would result if all complaints were forced into the reparations process (Commodity Futures Trading Commission, 1979 Annual Report, at 29).

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[7] Further proof that Congress did not intend for all commodity cases to be tried in one agency, in order to create a uniform body of law, is to be found in § 5a(11) of the CEA, 7 U.S.C. § 7a(11) which requires that commodity brokers provide for arbitration. The arbitrators are not employees of the CFTC or otherwise subject to its control.

Moreover, Congress did not require that all appeals from CFTC determinations be heard in one court, as it has done in other statutes.

The CFTC, as did the Department of Health, Education & Welfare in Cannon, supra, has candidly admitted that it is not equiped to police all commodity related transactions. See Amicus Brief of the Commodity Futures Trading Commission to the United States Court of Appeals for the Second Circuit, at p. 34:

> Similarly, the Commission is an agency with limited resources which are insufficient to permit it to police all commodity - related transactions, let alone to decide expeditiously all reparation complaints.

With this in mind, the CFTC has consistently taken the position that the 'exclusive jurisdiction' given to it does not preclude the institution of suits in federal courts.

The Commission initially stated its position as follows, in 41 Fed. Reg. 18,471 (1974):

> [P]rivate litigation seeking damages for alleged violations of provisions of the Act will rarely, if ever, involve issues appropriate for review by the Commission under the doctrine of primary jurisdiction. The judicial resolution of a private fraud action, for example, requires only the application of

> specific statutory standards to the particular conduct alleged. The issues raised by a particular fraudulent scheme, however complicated, are entirely within the conventional ability of the courts to resolve and should therefore not occasion referral to the Commission. If a court wishes the Commission to express its view on questions of law raised in litigation, it may request the Commission's participation as amicus curiae...

This view of the statute, adopted soon after its enactment by the agency changed with its enforcement, is entitled to great deference. E.g. U.S. v. Consumer Life Ins. Co., 430 U.S. 725 (1977): Chemehuevi Tribe of Indians v. Federal Power Commission, 420 U.S. 395 (1975).

H. The Opinion Below Adequately Considered the Remaining Cort Factors.

As Judge Friendly noted, the remaining Cort factors also support the implication of a private right of action (A 47, A-87). The regulation of commodity markets has been a federal matter since 1922. At least one court has held that the state courts have been preempted from determining common law claims of fraud arising from commodity futures

trading. See International Trading Ltd. v. Bell, 262 Ark. 244, 556 S.W.2d 420 (Ark. 1977), cert. den., 436 U.S. 956 (1978).

Commodity speculators were amongst the "especial" class for whom Congress acted to protect. In 1974, Congress understood that speculators were a prerequisite to the adequate functioning of the commodity markets who warranted the Act's protection.

III. A DENIAL OF CERTIORARI WOULD NOT CREATE UNDUE HARDSHIP FOR PERSONS IN PETITIONERS' POSITIONS

The petitions for certiorari argue that, unless the Court decides now whether a cause of action exists under the CEA, it is probable that the "district courts will accept the existence of a cause of action for damages against contract markets as established[ ]", and "delineat[e] the precise contours of the private cause of action". (petition for certiorari of the Exchange, No. 80-757 at 11).

The result is said to be potential liabilities, whether through adjudication or settlement "in millions of dollars." Petitioners apparently believe that any such liabilities would clearly be unjustified.

This case shows otherwise. The sanctions imposed by the CFTC against Simplot and Taggares and the penalties rendered by petitioner Exchange against petitioners-brokers make it clear that the conduct complained of was wrongful.

In any event, the fear of strike suits may be reason not to expand upon the

standing of persons able to assert a cause of action, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), or to require a greater showing by persons seeking to establish a cause of action (Securities & Exchange Commission v. Texas Gulf Sulphur Co. 401 F.2d 833, 867 (2nd Cir. 1968) (Friendly, J. concurring), cert. den. sub nom. Coates v. Securities & Exchange Commission, 394 U.S. 976 (1969); Smith v. Groover, 468 F.Supp. 105 (N.D. Ill. 1979)). It is not, however, a reason to abolish respondents' Congressionally recognized private cause of action.

The courts will, as petitioners suggest, undoubtedly grapple with the questions of causation and limitations in damages. Precisely because these questions have not been answered, petitioners' claims about the possibility of strike suits are premature.

The decision below is not the first to allow a suit under the CEA; the first reported suit under the CEA dates to 1967. Petitioners point to no evidence that such suits are usually, or even frequently, unfounded. Indeed, they make no claim that they, or others, have been victims of strike suits under the CEA. All they say

is that a significant number of suits have been brought under the Act.

A more reasonable interpretation of the facts offered by petitioners is that despite the existence of the CFTC, there remains a continuing need for private damage suits to remedy illegal and fraudulent practices and to make those who are the victims of such practices whole.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

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Dated: January 9, 1981

MOTION FILED

No. 80-757

DEC 24 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,
Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF NINE UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*, and BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December 19, 1980

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No. 80-757

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF NINE UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The EXCHANGES[1] respectfully move, pursuant to Rule 36 of this Court, for leave to file the accompanying brief *amici curiae* in support of the petition of the New York Mercantile Exchange for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

[1] Board of Trade of the City of Chicago; Board of Trade of Kansas City, Mo., Inc.; Chicago Mercantile Exchange; Citrus Associates of the New York Cotton Exchange, Inc.; Coffee, Sugar & Cocoa Exchange, Inc.; Commodity Exchange, Inc.; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; and New York Cotton Exchange.

The New York Mercantile Exchange consented to the EXCHANGES' appearance as *amici curiae*, but the respondents have refused such consent.

The question presented by the petition is whether the Second Circuit erred when it held in a two-to-one decision that a private cause of action for damages may be implied against a commodity exchange and its officials for alleged violations of the Commodity Exchange Act (7 U.S.C. §§ 1-25).

The EXCHANGES, like the Petitioner New York Mercantile Exchange, are federally-designated commodity exchanges on which futures contracts may be lawfully traded in the United States. Nearly 75 million futures contracts were traded through their facilities in 1979 alone. By virtue of the size, scope, and importance of the EXCHANGES' markets, and the accompanying duty to police those markets, their exposure in and vulnerability to private suits is enormous and the potential impact devastating.

The decision of the Second Circuit immediately and directly affects several of the EXCHANGES. For example, the Chicago Board of Trade and the Commodity Exchange, Inc., are defendants in an action pending in the United States District Court for the Southern District of New York (*Selig Strax* v. *Commodity Exchange, Inc., et al.*, No. 79 Civ. 5366) in which damages of more than one billion dollars are sought against these exchanges for alleged violations of the Commodity Exchange Act.[2]

[2] Additionally, the Citrus Associates of the New York Cotton Exchange, Inc. is a defendant in an action pending in the Southern District of New York predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Citrus Associates in the amount of 5 million dollars. *Nancy Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc., et al.*, No. 78 Civ. 178. The Commodity Exchange, Inc., is a defendant in another action

(Footnote continued on following page)

The EXCHANGES believe that the instant case involves significant issues of public policy, central to the nature and proper functioning of federally-mandated self-regulation by the EXCHANGES, which deserve this Court's analysis. Moreover, important aspects of the pertinent legislative history, critical to determining the questions raised in this case, simply were not considered by the Second Circuit.

Although most forceful and compelling, the Petition of the New York Mercantile Exchange does not address these considerations.

WHEREFORE, the EXCHANGES respectfully request this Court for leave to file their brief *amici curiae* submitted herewith.

Respectfully submitted.

PHILIP F. JOHNSON

(Footnote continued from preceding page)
pending in the Southern District of New York also predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 100 million dollars. *Republic National Monetary Corp.* v. *Commodity Exchange, Inc., et al.*, No 80 Civ. 5397. Also, the Chicago Board of Trade is a defendant in two actions pending in the Northern District of Illinois predicated on alleged violations of the Commodity Exchange Act which seek damages against the Board in excess of 5.6 million dollars. *Philip Smith* v. *Richard Groover, et al.*, No. 77 C 2297; *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.*, No. 80 C 1111. The Coffee, Sugar & Cocoa Exchange, Inc. is a defendant in a state court action in Texas predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 2 million dollars. *Schneider, Bernet & Hickman, Inc.* v. *Equitable Trust Co.*, No. 78-CI-10640, Dis.Ct., 150th Jud.Dis., Bexar County, Texas.

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December 19, 1980

QUESTION PRESENTED

Whether it was the intent of Congress that federally-designated commodity exchanges, which operate under pervasive federal regulation and are subject to severe penalties and sanctions for noncompliance with their duties under the Commodity Exchange Act, and which have been specifically exempted or excluded from every provision of the Act creating private causes of action for damages, should nevertheless be subject—by implication alone—to private damage claims under section 5(d), 5a(8), or 9(b) of the Act [7 U.S.C. § 7(d), 7a(8), or 13(b)].*

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* Related questions are presently before this Court:

(1) Whether section 4b of the Commodity Exchange Act [7 U.S.C. § 6b] provides customers with a cause of action for damages against their futures commission merchants is the subject of the pending petition in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203. In this regard, the EXCHANGES join with the New York Mercantile Exchange in suggesting that the Court consider that petition and the instant petition together.

(2) Whether section 4b or section 9(b) of the Commodity Exchange Act [7 U.S.C. §§ 6b, 13(b)] provides *non*-customers with a cause of action for damages against futures commission merchants is the subject of petitions to review the judgment below which have been filed by Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.

No. 80-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE,
RICHARD B. LEVINE,
HOWARD GABLER AND ALFRED PENNISI,

Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF NINE UNITED STATES COMMODITY EXCHANGES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of the EXCHANGES,[1] as *amici curiae*, in support of the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit filed on November 12, 1980 by the New York Mercantile Exchange.

[1] Board of Trade of the City of Chicago; Board of Trade of Kansas City, Mo., Inc.; Chicago Mercantile Exchange; Citrus Associates of the New York Cotton Exchange, Inc.; Coffee, Sugar & Cocoa Exchange, Inc.; Commodity Exchange, Inc.; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; and New York Cotton Exchange.

PRELIMINARY STATEMENT

Once again the Court is asked to decide "whether a private remedy is implicit in a statute not expressly providing one," *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 562 (1979)—this time under the Commodity Exchange Act.

The petitioner New York Mercantile Exchange specifically seeks review and reversal of the decision in *Leist* v. *New York Mercantile Exchange*, ____ F.2d ____, Comm. Fut.L.Rep. (CCH) ¶21,051 (2d Cir. 1980), where the Second Circuit held in a two-to-one decision that federally-designated commodity exchanges and their officials may be sued for unlimited damages for alleged violations of the Commodity Exchange Act (7 U.S.C. § §1-25).

The Second Circuit reached this far-reaching result notwithstanding the fact that the Act does not provide for any such private suit; nothing in the pertinent legislative history evidences any congressional intent whatsoever to create, by implication, private causes of action against exchanges and their officials; and, to the contrary, Congress has assiduously avoided creating such causes of action on numerous occasions, beginning with its earliest legislative actions in 1921 and as recently as the latest revision of the Act in 1978.

NATURE AND INTEREST OF THE EXCHANGES

The EXCHANGES, like the Petitioner New York Mercantile Exchange, are federally-designated commodity exchanges on which futures contracts may be lawfully traded in the United States. By law (the Commodity Exchange Act) such trading may be conducted only by and through members of these ten exchanges, as well as the recently designated New York Futures Exchange, in accordance with exchange rules and the provisions of the Commodity Exchange Act. (See 7 U.S.C. § §6, 6b, 6c, 6h).

Located in Chicago, Kansas City, Minneapolis, and New York City, the EXCHANGES provide markets for futures trading in agricultural and forest products, metals, rubber and petroleum products, foreign currencies and financial instruments. Thousands of producers and commercial users of these commodities avail themselves of the EXCHANGES' diverse markets. In 1979, nearly 75 million contracts were traded on the EXCHANGES, representing billions of dollars worth of commodities.[2]

By motion filed herewith, the EXCHANGES seek leave to appear as *amici curiae* because they believe that the resolution of the question presented for review will have a substantial impact on their own operations as self-regulatory organizations and as world markets. By virtue of the size, scope and importance of their markets, and the accompanying duty to police those markets, the EXCHANGES' exposure in and vulnerability to private damage suits is enormous, and the impact is potentially devastating.

The Second Circuit's decision immediately and directly affects several of the EXCHANGES. For example, the Chicago Board of Trade and the Commodity Exchange, Inc. are defendants in an action pending in the United States District Court for the Southern District of New York in which damages of more

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[2] "The importance of futures trading to the general public and to the Nation equals the importance of the securities markets." [Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 19 (1974)]. The nature, function and economic importance of futures trading have been described by this Court on a number of occasions. See *Board of Trade of the City of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 245, 247-49 (1905); *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 235-36 (1918); *Board of Trade of the City of Chicago* v. *Olsen*, 262 U.S. 1, 33 (1923); *United States* v. *New York Coffee & Sugar Exchange, Inc.*, 263 U.S. 611, 618-21 (1924).

than one billion dollars are sought against them for alleged violations of the Commodity Exchange Act.[3]

Central to the EXCHANGES' interest in this case is the fact that, as duly designated "contract markets" under the Commodity Exchange Act, their mandated activities are not confined simply to the conduct of a commercial business. Since the first enactment of a federal futures trading law in 1921, Congress has assigned to commodity exchanges another important role, namely, the duty to police their marketplaces and to act as a supplement and partner to the federal government in achieving the public-protection objectives of the law (now the Commodity Exchange Act). Few institutions occupy such a status in this society and, as a result, it is inappropriate to define an exchange's legal posture as that of an ordinary commercial enterprise.

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[3] *Selig Strax* v. *Commodity Exchange, Inc., et al.*, No. 79 Civ. 5366 (S.D.N.Y.). Additionally, the Citrus Associates of the New York Cotton Exchange, Inc. is a defendant in an action pending in the Southern District of New York predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Citrus Associates in the amount of 5 million dollars. *Nancy Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc., et al.*, No. 78 Civ. 178. The Commodity Exchange, Inc. is a defendant in yet another suit pending in the Southern District of New York also predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 100 million dollars. *Republic National Monetary Corp.* v. *Commodity Exchange, Inc., et al.*, No. 80 Civ. 5397. Also, the Chicago Board of Trade is a defendant in two suits pending in the Northern District of Illinois predicated on alleged violations of the Commodity Exchange Act which seek damages against the Board in excess of 5.6 million dollars. *Philip Smith* v. *Richard Groover, et al.*, No. 77 C 2297; *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.*, No. 80 C 1111. The Coffee, Sugar & Cocoa Exchange, Inc. is a defendant in a state court action in Texas predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 2 million dollars. *Schneider, Bernet & Hickman, Inc.* v. *Equitable Trust Co.*, No. 78-CI-10640, Dis.Ct., 150th Jud.Dis., Bexar County, Texas.

Moreover, it is important to recognize that private suits brought against commodity exchanges (including their officials) for "violating" the Commodity Exchange Act rarely allege actual misconduct by the exchanges. Rather, the commonplace allegation is simply that *others* engaged in unlawful activity that the exchanges' self-policing system failed to detect or prevent. The gravamen of these complaints, therefore, goes to the question of enforcement effectiveness and the appropriateness of regulatory responses, issues that frequently emerge as well when a federal agency fails to detect or prevent violations of the statute that it administers or makes difficult judgment calls in the face of problems it perceives.

Thus, there exists a close parallel, in law and in public policy, between the commodity exchanges and the federal agencies in regard to the propriety of awarding damages simply upon proof of enforcement deficiencies or judgmental errors. This case presents the Court with an opportunity to decide whether different legal consequences should flow for such deficiencies or errors as between the exchanges and the Commodity Futures Trading Commission ("CFTC"), both of which are charged with essentially the same duties under the Commodity Exchange Act.

SUMMARY OF ARGUMENT

The EXCHANGES emphatically agree with the New York Mercantile Exchange that a writ of certiorari should issue because the Second Circuit decided an important question of federal law which has not, *but should be*, settled by this Court; and because the decision of the Court of Appeals is utterly irreconcilable with the decisions of this Court, most particularly the recent decisions in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); and *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980).

Additionally, the EXCHANGES submit that at the heart of this case are significant issues of public policy, central to the nature and proper functioning of federally-mandated self-regulation under the scheme of the Commodity Exchange Act, which were ignored by the Court below, but which clearly argue against implying causes of action against commodity exchanges and their officials. Such causes should be implied only if there is persuasive evidence that this was Congress' intent. The evidence is patently lacking. To the contrary, there is ample evidence that Congress specifically did *not* intend to create such a cause of action.

Furthermore, important aspects of the pertinent legislative history critical to determining the questions raised in this case were not given even cursory consideration by the Court of Appeals. Fully developed, the legislative history demonstrates beyond doubt that Congress has never expressed any intention to create private causes of action against exchanges (including their officials) and that, to the contrary, it has assiduously avoided doing so on a number of occasions.

These issues and aspects should be considered by the Court *at this time*, lest it later be forced to simply "acquiesce" to lower court decisions which can reasonably be expected to proliferate as a result of the Court of Appeals' lengthy and superficially "definitive" majority opinion. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 692 n. 13 (1979).

ARGUMENT

I.

IMPORTANT ASPECTS OF THE PERTINENT LEGISLATIVE HISTORY WERE NOT CONSIDERED BY THE COURT OF APPEALS.

Despite their length and obvious scholarship, both the majority and dissenting opinions of the Court of Appeals fail altogether to consider important aspects of the pertinent legisla-

tive history which should be considered by any court in determining whether Congress intended to create, *by implication*, private causes of action under various sections of the Commodity Exchange Act.[4]

Unlike other commodity-related statutes codified in title 7 of the *U.S. Code*, the Commodity Exchange Act (7 U.S.C. §§ 1-25) does not expressly provide for any private causes of action except in two limited circumstances: (1) administrative repara-

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[4] We submit that the "central inquiry" and "dispositive question" in this case *vis-a-vis* the exchanges (including their officials) is "whether Congress intended to create, either expressly or by implication, a private cause of action" under section 5(d), 5a(8), or 9(b) of the Commodity Exchange Act [7 U.S.C. § 7(d), 7a(8), or 13(b)]. *Redington*, 442 U.S. at 575; *Transamerica Mortgage*, 444 U.S. at 24.

Where, as is the case with sections 5(d), 5a(8), and 9(b), no express private causes are created, and the statute nowhere else provides for such causes against an exchange but does expressly provide other means for judicial and administrative enforcement, the question is whether Congress intended to create any such causes *by implication*, and such intent must be demonstrated by "persuasive evidence." In this connection, the focus must be on Congress' intent *at the time each particular statutory provision in question was enacted*. *Redington*, 442 U.S. at 571, 575 n. 16, 576; *Transamerica Mortgage*, 444 U.S. at 20.

The Court of Appeals majority, however, completely failed to follow this analytical approach. Instead, it looked at the Act as a whole, and appears to hold that any violation will support a cause of action.

It should be noted also that many of the allegations against the exchange in the complaints below appear to have nothing whatsoever to do with the sections of the Act allegedly violated, or with any other section of the Act. (See NYME Petition, p. 3). For example, no provision of the Act requires an exchange to "maintain an orderly market." (The term "orderly market" simply does not appear in the Commodity Exchange Act). Neither does the Act direct an exchange to report violations of the Act, CFTC regulations, and exchange rules. Nonetheless, the Court of Appeals majority appears to hold—again without any analysis—that these bare allegations somehow state a cause of action *under the Act*.

tions and (2) state *parens patriae* suits. [Exchanges are expressly exempted in both cases (7 U.S.C. §§ 18, 13a-2)]. This is in sharp contrast, for example, with sections 209 and 499e of title 7.

Of particular significance is section 209 of title 7, the current codification of section 308 of the Packers and Stockyards Act of 1921.[5] The Packers and Stockyards Act became law during the same month of 1921 as the Future Trading Act of 1921[6] (reenacted in revised form in 1922 as the Grain Futures Act[7] following this Court's decision in *Hill* v. *Wallace*[8]) and was written by the same congressional committees as the Future Trading Act.[9] Section 5(d) of the Commodity Exchange Act [7 U.S.C. § 7(d)], under which the Second Circuit majority implied a private cause of action against the New York Mercantile Exchange, is a carryover, *substantially word for word*, from section 5(d) of the Future Trading Act.[10]

In section 308 of the Packers and Stockyards Act of 1921 (7 U.S.C. § 209), the 67th Congress (again, the same Congress which enacted the Future Trading Act and also the Grain Futures Act) expressly provided that any stockyard, market agency, or dealer who violates specified sections of that Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation"; and that such liability may be enforced either by suit *in a federal district court, or* by a reparations complaint to the Secretary of Agriculture (under section 309 of that Act, 7 U.S.C. § 210).

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[5] Act of Aug. 15, 1921, ch. 64, 42 Stat. 165.

[6] Act of Aug. 24, 1921, ch. 86, 42 Stat. 187.

[7] Act of Sept. 21, 1922, ch. 369, 42 Stat. 998. In 1936, the Grain Futures Act was recaptioned the Commodity Exchange Act. (Act of June 15, 1936, ch. 545, § 1, 49 Stat. 1491).

[8] 259 U.S. 44 (1922).

[9] See G.O. Virtue, "Legislation for the Farmers: Packers and Grain Exchanges," 37 *Quar. J. of Econ.* 687, 693 (1923).

[10] 42 Stat. 188.

Clearly Congress, *even in 1921*, knew precisely how to (and did) create private causes of action, *when it intended to do so*. See *Redington.*, 442 U.S. at 572, 575; *Transamerica Mortgage*, 444 U.S. at 20-21. Yet no provision in any way comparable to section 308 of the Packers and Stockyards Act was enacted in the Future Trading Act, or in the Grain Futures Act adopted by the same Congress one year later.

In 1974 Congress obviously borrowed from the Packers and Stockyards Act of 1921, as well as the Perishable Agricultural Commodities Act of 1930 (see 7 U.S.C. §§ 499f and 499g), in creating an administrative reparations system under the Commodity Exchange Act.[11] Exchanges are *exempted* from this reparations system, however (7 U.S.C. § 18).

Moreover, in creating this reparations system, Congress did *not* borrow from section 308 of the Packers and Stockyards Act of 1921 (7 U.S.C. § 209), or the virtually identical provision in the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. § 499e). Thus, no provision in any way comparable to these sections—*authorizing damage suits, as well as administrative reparations*—was adopted, and the Commodity Exchange Act contains no such provision. See particularly, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) (decided some 10 months *prior to* enactment of the 1974 amendments to the Commodity Exchange Act).

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[11] *E. g., compare* 7 U.S.C. §§ 499f & 499g *with* sec. 105, H.R. 11955, 93d Cong., 1st Sess. (1973), printed at *Hearings Before the House Agriculture Comm. on H.R. 11955*, 93d Cong., 2d Sess. 341-47 (1974). See also *Hearings Before the House Agriculture Comm. on H.R. 11955* at 253 n.1 (testimony of C.W. Chapin); *Hearings Before the Senate Comm. on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 & H.R. 13113*, 93d Cong., 2d Sess. 565 (testimony of B.H. Jones) (1974); Valdez, "Modernizing the Regulation of Commodity Futures Markets," 13 *Harv. J. Legis.* 35, 60 (1975); *Stucki* v. *American Options Corp.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,559 at 22,286 (CFTC No. R77-59, Feb. 13, 1978).

We underscore: The Court of Appeals majority and dissenting opinions contain no analysis whatsoever of the implications of this significant legislative history.

Additional aspects of the pertinent legislative history which were not adequately analyzed by the Second Circuit (and which would be briefed if the Petition were granted) include the 67th, 74th, and 90th Congresses' expressed intent in enacting sections 5(d), 5a(8), and 9(b); the significance of Representative Fino's bill [H.R. 9178, 90th Cong., 1st Sess. (1967)] in the formulation of the 1968 amendments to the Act; and the significance of Representative Smith's and Senator Hart's bills [H.R. 11195, 93d Cong., 1st Sess. (1973); S. 2837, 93d Cong., 1st Sess. (1973)] in the formulation of the 1974 amendments to the Act.[12]

Fully developed, the legislative history demonstrates that Congress has never expressed any intention whatsoever to create private causes of action under the Act against exchanges and their officials; that it has assiduously avoided creating such causes on several occasions, while enacting many other provisions of bills which would have done so; and that, while obviously borrowing from other statutes in important respects, it has *not* borrowed from related provisions in those statutes which expressly create private causes.[13]

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[12] While many provisions of the Fino, Smith, and Hart bills were incorporated in the 1968 and 1974 amending acts, provisions in them expressly creating private causes of action against exchanges were not incorporated.

[13] Thus important questions of constitutional law are raised in this case, since Article I of the Constitution vests legislative powers exclusively in Congress. And Congress has repeatedly refrained from providing *any* private cause of action against exchanges and their officials under *any* provision of the Commodity Exchange Act. See *Cannon*, 441 U.S. at 730 (Powell, J., dissenting). See also *Wilson* v. *First Houston Investment Corp.*, 556 F.2d 1235, 1243-45 (5th Cir. 1978) (Hill, J., dissenting), *vacated* (and remanded for further consideration in light of *Transamerica Mortgage*), 444 U.S. 959 (1979).

II.

AT ISSUE ARE SIGNIFICANT QUESTIONS OF PUBLIC POLICY WHICH DESERVE THIS COURT'S ANALYSIS.

A private cause of action "should not be implied if it would frustrate the underlying purpose of the legislative scheme." *Cannon*, 441 U.S. at 703. Such would be the result, however, if private causes of action are implied against exchanges and their officials under the Commodity Exchange Act.

a. The Scheme of the Act

Congress has designed the Commodity Exchange Act "to provide a *uniform* regulatory structure covering all futures trading . . . [and] to allow for the extension of the economic benefits of futures trading under this structure to those areas of commerce where the risk-shifting and price-discovery functions of futures markets might prove to be of value." [Sen. Rep. No. 95-850, 95th Cong., 2d Sess. 10 (1978) (emphasis added)].

So designed, the Act constitutes an elaborate regulatory scheme in which Congress has provided a "pervasive panopoly of judicial and administrative means for enforcing compliance with the Act,"[14] including civil fines, compensatory reparations, arbitration, cease and desist orders, injunctive and emergency orders, and criminal penalties.

But at the same time, Congress has expressly recognized and codified the critical, central role of the commodity exchanges. Under the Act, for example, the exchanges:

(1) Develop and design all futures contracts, and set the terms and conditions for such contracts (7 U.S.C. §§ 7, 7a).

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[14] *Leist*, Comm. Fut. L. Rep. (CCH) at 24,190 (Mansfield, J., dissenting).

(2) Provide the exclusive facility for trading these contracts (7 U.S.C. §§ 6, 6b, 6c, 6h).

(3) Establish standards for and control the admission to membership of persons by or through whom such contracts may lawfully be traded (7 U.S.C. § 12c).

(4) Enforce contract terms and trading requirements [7 U.S.C. § 7a(8)].

(5) Evaluate confidential market information obtained from the federal government [7 U.S.C. § 12a(6)].

(6) Provide administrative machinery designed to prevent market manipulation [7 U.S.C. § 7(d)].

(7) Conduct disciplinary proceedings (7 U.S.C. § 12c).

(8) Disseminate market information (7 U.S.C. § 6g).

(9) Arbitrate customer/broker disputes [7 U.S.C. § 7a(11)].

(10) Prescribe and enforce financial rules for futures commission merchants [7 U.S.C. §§ 6f(2), 7a(9)].

(11) Intervene in the markets in emergency situations [7 U.S.C. §§ 7a(12), 12a(9)].

In performing this critical, central role, the exchanges operate under *pervasive federal oversight*. The Commodity Futures Trading Commission is vested with jurisdiction, for example:

(a) To license an exchange as a "contract market" (a precondition to lawful operation), but only if the exchange meets many specific requirements (7 U.S.C. §§ 7, 7a).

(b) To receive for review and prior approval all exchange rules relating to contract terms and other trading requirements [7 U.S.C. § 7a(12)].

(c) To alter or supplement the rules of an exchange if deemed necessary or appropriate to protect producers, users, or consumers [7 U.S.C. § 12a(7)].

(d) To specify the periods within which deliveries of the underlying commodity may be made [7 U.S.C. § 7a(4)].

(e) To specify the grades of commodities deliverable and the locations where deliveries may occur [7 U.S.C. §§ 7a(b), 7a(10)].

(f) To specify the maximum amount of futures contracts that can lawfully be owned or traded by a person in a single day (7 U.S.C. § 6a).

(g) To review, affirm, reverse or modify a disciplinary or access denial action taken by an exchange (7 U.S.C. § 12c).

(h) To initiate a disciplinary or access denial proceeding if an exchange fails or refuses to do so (7 U.S.C. § 12c).

(i) To review, affirm, reverse or modify any other action taken or withheld by an exchange (7 U.S.C. § 12c).

(j) To inspect the books and records of the exchange, its board and committees [7 U.S.C. § 7a(2)].

(k) To conduct investigations into the operations of exchanges [7 U.S.C. § 12(a)].

(l) To declare a market emergency and direct an exchange to take corrective action [7 U.S.C. § 12a(9)].

(m) To seek injunctions (including mandamus) in the federal courts preventing or enjoining an exchange from violating the Act or the rules, regulations or orders thereunder (7 U.S.C. § 13a-1).

(n) To institute administrative actions against an exchange for violations, and to issue cease-and-desist orders in connection therewith (7 U.S.C. § 13a).

(o) To impose civil penalties up to $100,000 for each offense under the Act against an exchange or any of its directors, officers, agents or employees (7 U.S.C. § 13a).

(p) To cause criminal proceedings to be instituted against an exchange for violation of certain provisions of the Act, carrying fines of up to $500,000 and up to 5 years imprisonment [7 U.S.C. §§13a, 13(b), 13c].

(q) To suspend or revoke the designation of an exchange as a "contract market" for violations of the Act (7 U.S.C. § 7b)[15]

It is clear from the nature of the CFTC's oversight powers that self-regulation remains the first line of defense of the regulatory scheme. Self-regulation is, after all, a concept which "has been followed by the exchanges since their inception, *and continually encouraged by the Congress.*" [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 44 (1974) (emphasis added)].

b. The Need for Centralized, Uniform Regulation

A private remedy against commodity exchanges and their officials with respect to their self-regulatory activities is patently incompatible with the objectives of the regulatory system of the Commodity Exchange Act and, in fact, frustrates "the underlying purpose of the legislative scheme," *Cannon*, 441 U.S. at 703.

Self-regulation, as Congress has recognized, operates under a system of commodity exchange rules or bylaws "descriptive of 'ideal industry practice' " and the role of the exchanges is to "encourage their members to strive toward that ideal." [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 45 (1974)]. For that reason, "nearly all [commodity] exchanges have nebulous rules prohibiting [for example] 'inequitable conduct' or 'unbusinesslike dealings.' " [*Id.*].

In this environment, the potential for mischief through private actions testing the sufficiency of self-regulatory efforts is manifest. Scores of different district courts will be called upon, not only to render their own interpretations of commodity

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[15] See also *Leist*, Comm. Fut. L. Rep. (CCH) at 24,194-95 (Mansfield, J., dissenting).

exchange rules, but also to decide the quantum of self-regulatory vigor to be expected of the exchanges. Over time, the exchanges will face a multitude of conflicting interpretations of both their rules and their duties, a result that this Court has warned against in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689-90 (1975).[16]

Such a result is diametrically opposed to the plan of centralized, *uniform* regulation embodied in the Commodity Exchange Act. Indeed, Congress has given the CFTC a rare grant of "exclusive jurisdiction" over the exchanges *vis-a-vis* other federal and state regulatory agencies (7 U.S.C. § 2), for the express purpose of assuring that "the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings." [120 *Cong. Rec.* 30459 (September 9, 1974) (remarks of Sen. Talmadge)].

At the same time, Congress has given the CFTC powers to review and change all pertinent exchange rules and to examine exchange self-regulatory activities. These powers are clearly

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[16] The Chicago Board of Trade, Citrus Associates of the New York Cotton Exchange, Inc., Commodity Exchange, Inc., and Coffee, Sugar & Cocoa Exchange, Inc. are currently defending suits seeking damages against them in excess of $1,112,600,000—in courts in New York City, Chicago, and Bexar County, Texas. (See note 3). Often, as in several of these pending suits, the focus is on emergency actions taken by the exchanges, pursuant to the Commodity Exchange Act, in response to market problems which have been detected. Plaintiffs sue because the exchange actions were not to their liking—because they allegedly interfered with their profits—or because the actions were insufficient *in their opinion*. The mere defense of these suits, of course, is a considerable drain on self-regulatory resources. And because of the highly leveraged nature of futures trading, as well as the large volume of transactions which by law must be conducted only on federally-designated commodity exchanges, the potential for damage claims against the exchanges is enormous—far greater, we submit, than that faced by stock exchanges. It should be underscored: Unlike securities, there is no over-the-counter market in futures. All futures trading must be conducted on the exchanges.

adequate to protect the public and, in addition, to promote the uniformity desired by the Act. Under this scheme, there simply is no need, or place, for private suits.[17]

c. The Public Nature of the Exchanges

The character of exchange "violations" of the Commodity Exchange Act differs substantively from the misconduct generally outlawed by the Act. To the extent that an exchange falls short of effective self-regulation in a specific instance, it inflicts no direct injury upon the public. Rather, the injury results from the actions of others which the exchange did not (and, more likely, *could not*) prevent.

To attach private liability to exchange self-regulation in this context exposes commodity exchanges to serious risks not borne by their counterparts in the commodity regulation community. More important, this risk of liability actually works to discourage the setting of high standards of conduct by exchanges, a fact expressly recognized by Congress. [See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 46 (1974)].

Moreover, commodity exchanges cannot be both law enforcement agencies and the accused at the same time:

> —Exchanges must conduct their investigative efforts under the Act in a vigorous and conscientious manner

[17] Among these powers, for example, is the authority granted in section 6b of the Act (7 U.S.C. § 13a) to assess a civil penalty against an exchange for violating the Act or Commission rules or orders. In granting this authority to the Commission, however, Congress expressly mandated that, in determining the amount of penalty, the Commission must consider whether the amount will "materially impair" the exchange's "ability to carry on its operations and duties." Federal courts are not subject to the constraints of section 6b and could award damages that "materially impair," if not destroy, the ability of a commodity exchange to carry on its operations and duties. This is further evidence of how private suits against commodity exchanges can frustrate the legislative scheme.

without regard to whether the evidence accumulated by them might aid plaintiffs in suits against exchanges or weaken their own defense against damage claims.

—Exchanges must be prepared to act as impartial disciplinary tribunals under the Act and to reach objective decisions of guilt or innocence without the fear that their decisions might buttress a plaintiff's case against them or jeopardize their defense against damage claims.

—The confidentiality of exchanges' investigative work must be preserved, whereas those efforts may have to be disclosed prematurely to plaintiffs, or to co-defendants, either through normal civil discovery or as evidence of due diligence, to the potential jeopardy of the investigation's progress.

In short, the exchanges' law enforcement duties (mandated by Congress) cannot be reconciled with their status as defendants in matters that they have under active investigation. And private damage actions against exchanges for self-regulatory activities obviously contravene the strong public policy which underlies the immunity from private liability conferred on those who are charged with public enforcement duties under federal statutes, including the CFTC, with which the exchanges *share* enforcement responsibilities under the Commodity Exchange Act. The anomaly of different legal treatment of the exchanges and the CFTC under fundamentally identical circumstances, while performing essentially the same federally-mandated functions, is not only unwarranted; it is positively contrary to Congress' goal of quality public protection.

A parity of regulatory atmospheres is compelled by two factors. First, the exchanges, in performing self-regulatory activities mandated by the Commodity Exchange Act, engage in efforts that are functionally indistinguishable from the CFTC's own regulatory work and, if those self-regulatory

functions are to continue as the Act intends, they must be permitted to operate in a legal environment as sheltered from private damage liability as the courts have created for the federal regulatory agencies. Second, the exchanges' self-regulatory programs are so pervasively controlled by the CFTC as to content, procedures, and decisions that they are not "private" activities in any realistic sense.

To use the words of this Court, there exists here a "type of partnership between government and private enterprise," *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341, 366 (1963), designed "to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry," 373 U.S. at 371 (Stewart, J., dissenting). Clearly, self-regulation in the commodity industry constitutes *delegated governmental power:*

> *Under the practice of self-regulation, Governmental powers are delegated to the exchanges,* which undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in this complex and changing industry. [H.R. Rep. No. 93-963, 93d Cong., 2d Sess. 9 (1974) (emphasis added)].

In the performance of their self-regulatory activities, mandated by the Commodity Exchange Act and controlled at every stage by the CFTC, the exchanges reasonably should be entitled to the same protections from private damage suits that the government enjoys. The reasons for this protection are as compelling when applied to the exchanges as in the case of the CFTC. In addition to being able to perform their law-enforcement responsibilities in a vigorous and conscientious manner, without fear of the consequences:

> —Exchanges must be free to set strict and comprehensive standards of conduct for their members, even though a higher "failure rate" of compliance can be

expected, without fear that their less-than-perfect regulatory record will expose them to massive private damage liability.

—Exchanges must be free to criticize themselves, their own staff, their procedures and the quality of their efforts, and thus to effect necessary improvements, without fear that self-criticism will condemn them in private damage suits.

—Exchanges must be able to enlist the services of dedicated and talented members and staffs to administer their self-regulatory programs, without exposing them to the unacceptable risks of personal liability to private parties.

—Exchanges must be free to devote their limited resources to self-regulation as mandated by the Commodity Exchange Act, *not* to the costly defense of private damage actions.

CONCLUSION

Sound public policy clearly argues against implying private causes of actions against commodity exchanges and their officials. Such a result should be reached only if there is "persuasive evidence" that this was Congress' intent. *Transamerica Mortgage,* 444 U.S. at 20. Such evidence is patently lacking. To the contrary, Congress, when confronted directly with the question, has expressly recognized the exchanges' unique role in the scheme of the Commodity Exchange Act. Exchanges are expressly insulated from reparations suits and state *parens patriae* actions, the only private causes of action expressly provided for in the Act. Furthermore, the amount of civil penalties which may be assessed against exchanges by the CFTC is expressly limited so as not to impinge upon their important operations and federally-mandated self-regulatory programs. (7 U.S.C. §§ 13a, 13a-2, 18).

For the foregoing reasons, the EXCHANGES, as *amici curiae*, respectfully request that the petition of the New York Mercantile Exchange be granted.

Respectfully submitted,

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No. 80-757

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,

Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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RESPONDENTS' OPPOSITION TO MOTION
FOR LEAVE TO FILE BRIEF AMICI CURIAE

The respondents oppose the motion of nine United States Commodity Exchanges ("EXCHANGES") for leave to file a brief amici curiae before the granting of a writ of certiorari to the United States Court of Appeals for the Second Circuit in support of the instant petition of the New York Mercantile Exchange. Petitioners consented to the EXCHANGES' request for appearance as amici curiae.

These EXCHANGES lobbied intensively before Congress in 1974 for language specifically repealing an already implied cause of action under the Commodity Exchange Act. That position was specifically rejected by the Congress. See, Hearings on S.2485, S.2578, S.2837 and H.R. 13113 before the United States Senate Committee on Agriculture and Forestry, 93rd Cong., 2nd Session, at page 259.

The EXCHANGES should not now be permitted before this Court to dress that once rejected lobbying in legal clothes. As the proposed amici's motion candidly admits ". . . the instant case involves significant issues of public policy, central to the nature and ~~pro~~ proper functioning of . . . self regulation by the EXCHANGES . . . ." This was the thrust of the EXCHANGES' 1974 presentation to Congress. Congress rejected it then; this Court should not legislate it

now. See, Powell, J., dissenting in Cannon v. University of Chicago, 441 U.S. 667 (1979).

Moreover, the motion should be denied because counsel for petitioner, New York Mercantile Exchange, Maurice Mound, Esq., who signed its petition for certiorari as "of counsel", also signed the motion and proposed brief amici, as "of counsel" apparently on behalf of petitioner. We note that the last paragraph of the amici curiae motion for leave to file a brief amici curiae criticizes the petition for certiorari of the New York Mercantile Exchange in the last paragraph for failing to make certain arguments.

Apart from providing the Court with the rare spectacle of a petitioner seeking amicus status for itself, the motion affords petitioner an opportunity to present conflicting arguments. The Court should not permit the use of the disfavored brief amicus before the grant of certiorari in this improper way.

The motion should be denied, and respondents awarded their costs in opposing this motion.

Respectfully submitted,

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No. 80-757

IN THE

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OCTOBER TERM, 1980

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Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 9, 1981

Question Presented

Is there a private cause of action for damages against a commodity exchange (a designated "contract market" for the trading of futures contracts) and its officials under § 5(d), § 5a(8) or § 9(b) of the Commodity Exchange Act?

Whether § 4a, § 4b or § 9(b) of the Commodity Exchange Act provides a private cause of action for damages against futures commission merchants is the question presented in *Clayton Brokerage Co. of St. Louis, Inc.* v. *Leist*, No. 80-895, and *Heinold Commodities, Inc.* v. *Leist*, No. 80-936, which also seek reversal of the judgment below and have been consolidated for argument with this case.

Parties Below

The parties to the three consolidated appeals below were:

Neil Leist, et al. v. *John Richard Simplot, et al., No. 79-7402*

Appellants: Neil Leist ("Leist"), Philip Smith ("Smith") and Incomco.

Appellees: New York Mercantile Exchange (the "Exchange"), Richard B. Levine ("Levine"), Howard Gabler ("Gabler"), Alfred Pennisi ("Pennisi"), Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson").

Incomco v. *New York Mercantile Exchange, et al., No. 79-7464*

Appellant: Incomco.

Appellee: The Exchange.

National Super Spuds, Inc., et al. v. *New York Mercantile Exchange, et al., No. 79-7482*

Appellants: National Super Spuds, Inc., William R. Buster, Jr., Willard C. Shiner, Eugene P. Weisman, Richard Welts, Raymond Rothberg, Arthur S. Armstrong, Theodore Brinek, Capgain Holdings, Inc. and Heiz Romminger, all as class plaintiffs.

Appellees: Heinold and Thomson.

The Exchange* and Levine, Gabler and Pennisi seek reversal of the judgment in No. 79-7402. The Exchange seeks reversal of the judgment in No. 79-7464. The Exchange and Levine, Gabler and Pennisi were not parties to the appeal in No. 79-7482.

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* Pursuant to Rule 28.1, petitioners advise the Court that the Exchange is a not-for-profit corporation having no parents, subsidiaries or affiliates.

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No. 80-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE,
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Petitioners,

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Respondents.

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BRIEF OF PETITIONERS NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI

Opinions Below

The opinions of the court of appeals majority and of the dissenting circuit judge are officially reported at 638 F.2d 283 and are reprinted in the joint appendix in Nos. 80-757, 80-895 and 80-936 beginning at page JA 83. The opinion of the district court, whose judgment was reversed by the court of appeals, is reported at 470 F.Supp. 1256 and is reprinted beginning at page JA 60.

Jurisdiction

The judgment of the court of appeals was entered July 8, 1980. Petitioners' timely petition for rehearing, with a suggestion for rehearing *in banc*, was denied on September 9, 1980. Their petition for a writ of certiorari was filed on November 11, 1980 and invoked this Court's jurisdiction under 28 U.S.C. § 1254(1) (1976). The petition was granted on February 23, 1981.

Statutory and Constitutional Provisions

The texts of §§ 5(d), 5a(8) and 9(b) of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §§ 7(d), 7a(8) and 13(b) (1976 & Supp. III 1979), and the texts of §§ 2(a)(1), 3, 4a, 4b, 5b, 6(a), 6b, 6c, 6d and 14 of the CEA, 7 U.S.C. §§ 2, 5, 6a, 6b, 7b, 8(a), 13a, 13a-1, 13a-2 and 18 (1976 & Supp. III 1979), are set forth in the statutory appendix to this brief at page SA 1 *et seq.*

Article I, Section 1 of the United States Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The first sentence of Article III, Section 1 of the United States Constitution provides:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Statement of the Case

The Exchange is one of the twelve contract markets on which contracts for the future delivery of commodities are traded.* Levine, Gabler and Pennisi (collectively the "Exchange officials") were in 1976 the president, the vice president and the compliance officer of the Exchange. (JA 22)

One of the contracts for future delivery traded on the Exchange is a contract calling for May delivery of Maine potatoes. A number of "short" sellers of May 1976 potato contracts, trading through their futures commission merchants, Clayton, Heinold and Thomson, failed to deliver under May contracts that had not been liquidated by the timely purchase of offsetting "long contracts." Thereafter, a number of damage actions were instituted which related not so much to the default but rather to alleged price manipulation before trading closed.**

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* The other contract markets are:

Board of Trade of the City of Chicago
Board of Trade of Kansas City, Missouri, Inc.
Chicago Mercantile Exchange
Citrus Associates of the New York Cotton Exchange, Inc.
Coffee, Sugar & Cocoa Exchange Inc.
Commodity Exchange, Inc.
MidAmerica Commodity Exchange
Minneapolis Grain Exchange
New Orleans Commodity Exchange
New York Cotton Exchange
New York Futures Exchange

** The default was not the focus of the damage actions because the Exchange established a procedure whereby the defaulting shorts paid damages through the Exchange to the longs who held contracts under which delivery had not been made.

The Actions Against the Exchange and Its Officials

Two actions are the subject of No. 80-757 in this Court. The Exchange and its officials were not parties to the appeal which is one of the subjects of No. 80-936.*

In the *Leist* action (No. 79-7402 in the court of appeals), respondents Leist, Smith and Incomco, long speculators in the May 1976 potato contract, alleged that a conspiracy among shorts and their futures commission merchants manipulated the price of the contract downward. (JA 25-28) They also alleged that there was another conspiracy to manipulate the price upward. (JA 32-33) The alleged manipulators and the futures commission merchants were named as defendants.

The Exchange and its officials were not alleged to have been parties to the manipulations. Rather, it was alleged that the Exchange is "required by law to regulate activities of brokers and traders," that the activities of the Exchange "were the responsibility" of the Exchange officials, that the Exchange and its officials "negligently failed to maintain an orderly market for trading," that they "failed and neglected" to report violations of the CEA, the regulations of the CFTC and the bylaws and rules of the Exchange, that they "failed and neglected to direct the entry of liquidating orders" and that they "failed and neglected to exercise due care in policing activities of traders and brokers . . . and thereby failed to prevent the manipulative activities by the various other defendants." (JA 34-35)

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* No appeal was taken from the district court's dismissal as against the Exchange of the *National Super Spuds* action (No. 79-7482 in the court of appeals) because while the Exchange's motion to dismiss was *sub judice* in the district court the plaintiffs and the Exchange agreed in principle to a settlement which has since been finalized.

The jurisdiction of the district court was allegedly based upon 28 U.S.C. § 1331 (1976) and § 1337 (Supp. III 1979). (JA 16)

In the *Incomco* action (No. 79-7464 in the court of appeals), Incomco sued not as a speculator in futures contracts on the Exchange but rather as a speculator in "cash" potatoes stored in Maine. Incomco alleged that two of the long manipulators had created an artificial shortage of railroad cars which prevented Incomco from realizing expected profits from the sale of potatoes to shorts who might use the potatoes to make delivery under unliquidated May 1976 contracts. (JA 9-10) The Exchange was accused of failing to use its emergency powers to extend the period for delivery or to permit delivery by truck. (JA 10-11)

The complaint alleged the existence of a federal question, and jurisdiction was presumably based on 28 U.S.C. § 1331. (JA 8-9)

The Decisions Below

The district court (Lloyd F. MacMahon, D.J.) granted partial summary judgment dismissing the claims under the CEA, holding that the CEA does not provide a private cause of action against a contract market and its officials. (JA 60-77) A final judgment was entered thereon pursuant to Fed.R.Civ.P. 54(b). (JA 78-82)

The court of appeals majority reversed in an opinion by Judge Friendly joined in by Judge Kearse. (JA 83-173) Judge Mansfield dissented. (JA 173-249)

Summary of Argument

The factors relevant "to uncovering congressional intent to imply a private cause of action" were again and most recently identified in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 148-49 (1980). They are: the language of the statute; the presence of other remedies; and whether the statute's legislative history contradicts or confirms the negative inference to be drawn from the fact that Congress did not provide an express remedy. Congressional intent, not judicial perceptions of remedial purpose, is the sole constitutionally permissible determinant.

The language of the sections of the CEA at issue does not suggest, much less create, any private remedy. Section 5 is a licensing statute which states the factors to be considered, formerly by the Secretary of Agriculture and since 1975 by the Commodity Futures Trading Commission ("CFTC"), in the designation of contract markets. Section 5a sets forth the various duties of contract markets. Section 9(b) makes price manipulation or attempted manipulation a crime.

The CEA contains a number of express remedies directed at contract markets and their officials. A contract market's designation may be suspended or revoked for any violation of the CEA, including a failure to perform the conditions of its designation under § 5 or the duties imposed upon it by § 5a. A contract market and its officials are also subject to a cease and desist order and a civil penalty of $100,000 for a violation of the CEA. The CFTC may obtain an injunction or a writ of mandamus against a contract market. In addition to these remedies, the CEA contains two express monetary remedies—a reparations procedure enacted in 1974 and a provision for state

parens patriae actions enacted in 1978. Contract markets are exempted from both. The CEA contains three affirmative grants of jurisdiction to the district courts; none provides a jurisdictional basis for a private damage action against a contract market. The stated purpose of the CEA is to deal with the evils that may result from speculation, not to provide a damage remedy for speculators.

The legislative history of the enactment of §§ 5(d), 5a(8) and 9(b) in 1921, 1922, 1936 and 1968 contains no evidence that Congress intended to imply any private right of action. Companion legislation, the Packers and Stockyards Act of 1921, contained such a remedy, but none was provided in the CEA. When in 1968 subparagraph (8) was added to § 5a, a bill was introduced which contained a provision making contract markets liable in damages for a violation of the CEA or negligence in connection therewith; although many provisions of the bill were enacted, this provision was not.

The court of appeals majority sought to establish its view that "the rumors of the death of the implied cause of action . . . are exaggerated. . . ." The majority fixed the pertinent congressional action as taking place in 1974, when Congress enacted the Commodity Futures Trading Commission Act ("CFTCA") which created the CFTC and did not substantially alter §§ 5(d), 5a(8) or 9(b), since one court of appeals had in 1973 "implied" a cause of action against a contract market. The majority stated that Congress "should have" been aware of this decision and that it "implicitly" approved the "implied" remedy, although in 1974 Congress did not adopt various proposals for express private damage remedies against contract markets and did enact a reparations remedy from which contract markets are exempted. Reviewing the same legislative history and reaching the opposite conclusion from that of the majority

below, the Court of Appeals for the Fifth Circuit referred to "this metaphysical pursuit" in which "the mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design—a singularly inappropriate base upon which to predicate an implied private cause of action." The majority included in the "context" of the enactment of the CFTCA decisions which "implied" private causes of action under the securities laws, although their reasoning is no longer valid and there is no evidence that Congress was aware of them; the majority excluded this Court's ruling in early 1974, several months before the CFTCA was enacted, that an implied private cause of action will not be found absent clear evidence of legislative intent. *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974).

The majority's reliance on congressional silence, rather than an affirmative showing of congressional intent to create a private right of action, violated the separation of powers established by the Constitution and invites a continuing violation as the courts "delineate" the "contours" of the right of action the majority created. If this process of judicial legislation is followed, the lower courts and ultimately this Court will be faced with questions akin to those created by the "implied" cause of action under § 10(b) of the Securities Exchange Act of 1934. The ambiguities of an "implied" cause of action and class action claims for hundreds of millions of dollars would create enormous pressures for settlement without regard to the merits. There is considerable reluctance on the part of lower courts to give up the judicial implication of private causes of action. The search for congressional intent beyond its expression in statutory language permits that reluctance to become the basis for decision.

ARGUMENT

There Is No Private Cause of Action for Damages Against a Contract Market and Its Officials Under §§ 5(d), 5a(8) or 9(b) of the Commodity Exchange Act.

This Court's decision in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), was handed down four months before the decision of the court of appeals. It is cited in the dissenting opinion of Judge Mansfield (JA 181), but is not mentioned in the opinion of the majority.

In *Kissinger*, this Court again addressed the question of when the judiciary may infer that Congress intended to create a private remedy by implication although Congress did not expressly so provide. Citing its recent decisions, this Court gave a categorical answer:

> "This Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic here.* [* See *Touche Ross* v. *Redington*, 442 U.S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).] Our most recent pronouncement on the subject, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), readily disposes of the question. First, the language of the Records Act merely 'proscribes certain conduct' and does not 'create or alter any civil liabilities.' *Id.*, at 19. The Records Act also expressly provides administrative remedies for violations of the duties it imposes, implicating our conclusion in *Transamerica Mortgage* that it is 'an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others

> into it.' *Ibid.* Finally, the legislative history does not detract from the inference to be drawn from congressional silence, but rather confirms that such silence is purposeful." (445 U.S. at 148-49) (Bracketed footnote in original)

Kissinger reiterated that the judicial function is limited "to uncovering congressional intent." Put another way, the courts may "infer" but they may not "imply." •

That the courts may not legislate was stressed in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979):

> "SIPC and the Trustee contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. '[I]t is not for us to fill any *hiatus* Congress has left in this area.' *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963). Obviously, nothing we have said prevents Congress from creating a private right of action on behalf of brokerage firm

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• In substance, *Kissinger* and the other recent decisions of this Court follow the second, and essential, part of the reasoning in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33 (1916), where this Court found that the "inference" that a private cause of action was intended was rendered "irresistible" by language in the statute providing that an injured railroad employee would not be deemed to have assumed the risk and referring to a " 'remedial action for the death or injury of any railroad employee.' " (*Id.* at 39, 40) *See also Cort* v. *Ash*, 422 U.S. 66, 80 n.11 (1975).

The first part of the *Rigsby* reasoning—the common law concept of statutory tort, which was quoted by the majority below (JA 117-18)—was emphatically rejected in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). The argument made there by the respondents, which relied upon *Rigsby*, *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946) (the first decision to hold that there was an "implied" right of action under § 10(b) of the Securities Exchange Act of 1934) and Restatement of Torts § 286 (1934), was said by the Court to be "entirely misplaced." (442 U.S. at 568)

customers for losses arising from misstatements contained in § 17(a) reports. But if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent." (442 U.S. at 579)

In an early decision construing § 6(b) of the CEA, *Wallace* v. *Cutten*, 298 U.S. 229 (1936), the same principle was expressed. In an opinion by Justice Brandeis this Court held that the intention of Congress manifested in the language of the statute is determinative:

"The language of § 6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said in *Iselin* v. *United States*, 270 U.S. 245, 250-51: 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'" (298 U.S. at 237) (Brackets in original)

The recent decisions of the Court have again "made clear" that "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 16 (1979).

The majority below purported to adhere to this principle. (JA 150) Yet, in the absence of any evidence of affirmative congressional intent, the majority relied upon what it said was *implicit* approval by Congress of an "implied" remedy. In 1973 one court of appeals, relying on the statutory tort theory rejected in *Redington* (*see* p. 10 n.* *supra*), "implied" a cause of action under the CEA against a contract

market. *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). In 1974 the CFTCA which created the CFTC was enacted. The majority said that by the 1974 enactment Congress "implicitly approved" the 1973 decision. (JA 128)

The majority said that *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) "is strong support for the result." (JA 159) But while in *Cannon* this Court did take into account "contemporary legal context", it emphasized that the "threshold" factor is "the language of the statute itself." (441 U.S. at 699, 689) It stressed that the availability of private suits was "explicitly presumed" by Congress as shown by a provision for attorney's fees in the "package of statutes." (*Id.* at 699) It said that the statute in question presented "the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied private remedy are present." (*Id.* at 717)

The factors identified in *Kissinger* do not permit the inference of a private cause of action. As will be seen, the language of §§ 5(d), 5a(8) and 9(b) of the CEA upon which the respondents relied as to the Exchange and its officials (JA 171) "does not 'create or alter any civil liabilities' ", the CEA "expressly provides administrative remedies for violations of the duties it imposes", and its "legislative history does not detract from the inference to be drawn from congressional silence."

A. *The Language of §§ 5(d), 5a(8) and 9(b) Does Not Permit the Inference of a Private Cause of Action*

Section 5, 7 U.S.C. § 7, is a licensing statute which provides for designation of contract markets by the CFTC upon various conditions, including that stated in paragraph

(d). Section 5a, 7 U.S.C. § 7a, is a prescriptive statute which in paragraph (8) requires a contract market to enforce its rules that have been approved by the CFTC. Section 9(b), 7 U.S.C. § 13(b), is a criminal statute making market manipulation a crime punishable by criminal penalties.

Section 5(d)—Section 5 (SA 7) provides for the designation by the CFTC of a board of trade, or commodity exchange, as a contract market on which trading in futures contracts may take place when the market "complies with and carries out the following [seven] conditions and requirements. . . ." One such condition and requirement is that of paragraph (d):

> "(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board."

The purpose of § 5 is to establish criteria which govern the CFTC, formerly the Secretary of Agriculture, in performing its function of designating those commodity exchanges on which trading in futures contracts may be conducted. The CEA, of course, entrusts that function to the CFTC, not to private parties. Section 5 states: "The Commission is hereby authorized and directed to designate any board of trade as a 'contract market'. . . ."

Section 5 does not "expressly identify" a class of persons Congress intended to benefit, as was essential to the result in *Cannon*. (441 U.S. at 690) By its terms, § 5 is "forward-looking, not retrospective; it seeks to forestall . . . , not to provide recompense." *Redington*, 442 U.S. at 570-71. As this Court found with respect to similar provisions of the Motor Carrier Act in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 469 (1959), "language of this sort"

creates "only a 'criterion for administrative application . . .' rather than a 'justiciable legal right.' "

Section 5a(8)—Section 5a (SA 10) is a prescriptive statute which provides that "[e]ach contract market shall . . . " comply with twelve requirements. Paragraph (8) reads:

> "(8) Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section. . . . "

Section 5a sets forth the various responsibilities of contract markets ranging from record keeping to rule enforcement. Its language is structurally similar to § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), which was involved in *Redington*. This Court there ruled that "there is no basis in the language of § 17(a) for inferring that a civil cause of action for damages lay in favor of anyone." (442 U.S. at 571)

Section 9(b)—Section 9(b) (SA 23) is a criminal statute. It confers no private right of action against a contract market and its officials. It provides in pertinent part:

> "It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be

> delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of Section 6, 6b, 6c(b) through 6c(e), 6h, 6*o*(1), or 23 of this title [7], or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. . . ."

In *Cannon* this Court said that the statute before it—which "expressly identifies the class which Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra,* and other laws enacted for the protection of the general public." (441 U.S. at 690) The proper forum for redress of a § 9(b) violation is a criminal prosecution, the proper remedy, a criminal penalty. "[T]his Court has rarely implied a private right of action under a criminal statute and where it has done so, 'there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.'" *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 316 & n.46 (1979). Neither the language of § 9(b) nor that of the CEA as a whole permits such an inference.

The majority below acknowledged that the CEA "merely prescribe[s] duties, rather than explicitly creat[es] rights." (JA 160) It said, however, that "the form in which [congressional] intent is expressed cannot be permitted to become an obstacle to its realization." (*Id.*) This dismissal of

the statutory language is a striking contradiction of this Court's rulings in *Cannon* and in *Redington* that statutory language is the "most accurate indicator" of congressional intent (441 U.S. at 690 n.13) and that "[t]he source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce." (442 U.S. at 577)

B. *The Statutory Scheme of the Commodity Exchange Act Does Not Permit the Inference of a Private Cause of Action*

In *Kissinger*, the statutes under review "establishe[d] only one remedy for the improper removal of a 'record' from the agency." (445 U.S. at 148) Here, §§ 5(d), 5a(8) and 9(b) are part of a statutory scheme that provides the CFTC with various administrative remedies, as well as the right to bring injunction or mandamus suits, against contract markets. The CEA, moreover, provides two express monetary remedies, but contract markets are exempted from both.

The enactment by Congress of this statutory scheme implicates the conclusion of *Transamerica Mortgage*, reiterated in *Kissinger*, that "where a statute expressly provides a particular remedy or remedies, a Court must be chary of reading others into it." (444 U.S. at 19, quoted in *Kissinger*, 445 U.S. at 148-49) This is among the "most basic general principles of statutory construction." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) (*"Amtrak"*). *See also SIPC* v. *Barbour*, 421 U.S. 412, 419 (1975); *T.I.M.E. Inc.*, 359 U.S. at 471; *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929).

The majority below said that it was "unimaginable" that Congress could have meant what the statute says. (JA 149) Based on its conclusions concerning "contemporary

legal context", the majority argued that Congress "would be expected to say so" if it meant the express remedies to be exclusive. (JA 150) Aside from the majority's error in applying as the single controlling factor the particular "context" it described, the majority failed to explain why, since this "most basic" principle of statutory construction was part of that "context", Congress remained silent if it intended to create a damage remedy against contract markets.

Remedies applicable to contract markets—The CEA contains a number of enforcement provisions aimed directly at contract markets and their officials. If a contract market violates any of the provisions of the CEA, including by failing to enforce "its rules of government made a condition of its designation" under § 5 or to comply with any of the twelve requirements of § 5a, its designation may be suspended for up to six months or revoked under §§ 5b and 6(a), 7 U.S.C. §§ 7b, 8(a). (SA 16, 17) For any violation of the CEA a contract market "or any director, officer, agent or employee" is also subject to cease and desist orders and civil penalties of up to $100,000 under § 6b, 7 U.S.C. § 13a. (SA 18) Violation by a contract market or official of a cease and desist order under § 6b is a misdemeanor punishable by a fine of up to $100,000 or imprisonment from six months to one year or both, and each day during which the cease and desist order violation continues is considered a separate offense. Finally, under § 6c, 7 U.S.C. § 13a-1 (SA 20), the CFTC may sue to obtain an injunction or writ of mandamus against a contract market.

These remedies are essentially the same as those under the Investment Advisers Act which led this Court to comment in *Transamerica Mortgage:*

> "In view of these express provisions for enforcing the duties imposed by [the section there at issue], it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' *Cannon* v. *University of Chicago*, 441 U.S., at 742 (Powell, J., dissenting)." (444 U.S. at 20)

Express monetary remedies—The CEA contains two express monetary remedies for violations of the Act or of CFTC regulations. Neither is applicable to contract markets.

The first, the reparations procedure of § 14, 7 U.S.C. § 18 (SA 24), was enacted as part of the Commodity Futures Trading Commission Act of 1974, Pub.L.No. 93-463, 88 Stat. 1389 *et seq.* This procedure permits "any person" to seek damages in an administrative proceeding before the CFTC for violations of the CEA or any regulation under the CEA by persons "registered" under §§ 4d, 4e, 4k or 4m of the CEA, 7 U.S.C. §§ 6d, 6e, 6k, 6m, *i.e.*, futures commission merchants, floor brokers, associated persons of futures commission merchants, commodity trading advisors and commodity pool operators. The remedy may not be invoked against contract markets.

Section 14 was not the first administrative reparations procedure to be written into Title 7 (Agriculture) of the United States Code. That title contains two precedents for such a mechanism: one in the Packers and Stockyards Act of 1921 (7 U.S.C. § 210) and one in the Perishable Agricultural Commodities Act of 1930 ("PACA") (7 U.S.C. § 499g). Both statutes also include express provisions authorizing private actions for damages as an alternative to the reparations procedure (7 U.S.C. §§ 209, 499e). Although § 14 of the CEA is markedly similar to the analogous sections of the Packers and Stockyards Act

and the PACA and although the legislative history of the CEA contains many references to both these statutes,* Congress did not provide in the CEA for private damage actions.

The second express monetary remedy was enacted as part of the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865. Under § 6d, 7 U.S.C. § 13a-2 (SA 21), the states are authorized to bring "a suit in equity or an action at law" for equitable relief or "to obtain damages on behalf of their residents" in case of violations of the CEA or of any CFTC regulation by "any person." Congress expressly excluded contract markets, clearinghouses and floor brokers from the potential defendants to such *parens patriae* actions.

The Senate Report on the Futures Trading Act of 1978 said of § 6d:

> "The intent of the section is to provide States with the tools to combat fraudulent and other unlawful activity directed at their residents. *Plenary authority to register, regulate, and discipline the contract markets* and the 'locals' whose activities are generally of the character of pit trading rather than customer contact *is reserved to the Commission.*" (S. Rep. No. 850, 95th Cong., 2d Sess. 25 (1978)) (Emphasis added)

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* *Future Trading in Grain: Hearings on H.R. 5676 Before the Senate Committee on Agriculture and Forestry*, 67th Cong., 1st Sess. 302 (1921); *Grain Futures Act: Hearings Before the House Committee on Agriculture*, 67th Cong., 2d Sess. 2-15, 51-53 (1922); *To Amend the Grain Futures Act: Hearings on H.R. 6722 Before the Senate Committee on Agriculture and Forestry*, 74th Cong., 2d Sess. 247 (1936); *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Committee on Agriculture*, 93rd Cong., 2d Sess. 69, 71, 72 (1974); *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. 553, 559, 560, 563, 565-66, 616 (1974).

The House Report similarly stated that "[t]he power to enforce the requirements of the Act with respect to organized exchanges remains solely with the Commission." H.R. Rep. No. 1181, 95th Cong., 2d Sess. 15-16 (1978).

In *T.I.M.E. Inc.*, this Court addressed a similar statutory scheme in Title 49 (Transportation) of the Code where Part I of the Interstate Commerce Act (49 U.S.C. §§ 1 *et seq.*) relating to rail carriers expressly provided a reparations procedure while Part II, the Motor Carrier Act (49 U.S.C. §§ 301 *et seq.*), did not:

> "To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act." (359 U.S. at 471)

The CEA affirmatively expresses congressional concern for the impact that monetary liability may have upon the operations of contract markets. The CFTC is directed in determining the amount of any penalty under § 6b to consider "whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties." *

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* When paragraph (8) was added to § 5a in 1968 and again in 1974 when the Commodity Futures Trading Commission Act was enacted, bills were introduced that would have made contract markets liable in damages to aggrieved persons for violations of the CEA. None of these bills was enacted. *See* discussion at pages 27-28 and 34-35 *infra*.

This congressional concern makes particularly apt this Court's statement in *Redington*:

> "[W]e are extremely reluctant to imply a cause of action . . . that is significantly broader than the remedy that Congress chose to provide. *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. at 735-736; *see Ernst & Ernst* v. *Hochfelder, supra,* at 210; *Securities Investor Protection Corp.* v. *Barbour, supra,* at 421-423; *Amtrak, supra,* at 458; *cf. T.I.M.E., Inc.* v. *United States,* 359 U.S. at 471." (442 U.S. at 574)

The CFTC, as was the Secretary of Agriculture before it, is charged with the responsibility of overseeing the operations of the contract markets and of enforcing compliance by them with the CEA. "It does not follow . . . that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering" the purposes of the CEA. *SIPC* v. *Barbour,* 421 U.S. at 421. Such an action would "substitute the federal district courts for the . . . federal administrative bod[y]" and create "the potential . . . for a barrage of lawsuits that, either individually or collectively, could frustrate" rather than serve the congressional purpose. *Amtrak,* 414 U.S. at 462-63.

Jurisdictional provisions—Redington pointed out that rights must be found, if at all, in the substantive provisions of the statute, not in its jurisdictional provisions. The Court said that an argument based upon the jurisdictional provision of § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976), was "misplaced".

> "The reliance of SIPC and the Trustee on § 27 is misplaced. Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force

> and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision." (442 U.S. at 577)

Jurisdictional provisions may, however, provide evidence of congressional intent, *Transamerica Mortgage*, 444 U.S. at 21-22, and here they point against an "implied" private cause of action. The only jurisdictional provisions in the CEA conferring jurisdiction on the district courts are to be found in: § 6c (SA 20)—the district courts' jurisdiction to entertain actions by the CFTC for an injunction or mandamus against a contract market and others; § 6d(2) (SA 21)—the district courts' jurisdiction over "suits in equity and actions at law" brought by the states under the *parens patriae* provision enacted in 1978; and § 14(f) (SA 26-27)—as part of the reparations procedure enacted in 1974, the person for whose benefit a reparations award is made may file the CFTC order in the district court "for enforcement of such reparation award by appropriate orders." None of these sections provides jurisdiction for a private damage cause of action against contract markets.

Congress apparently felt it appropriate to insert express provisions conferring jurisdiction upon the district courts for the enforcement of the three judicial remedies it enacted. The absence of a similar jurisdictional provision for a private damages remedy strongly suggests that Congress never contemplated such a remedy under the CEA.*

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* The "savings clause" of § 2(a)(1) of the CEA, 7 U.S.C. § 2 (SA 2) (providing that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State") is not an affirmative jurisdictional provision. As Judge Mansfield pointed out in his dissenting opinion, that clause was added by Congress in 1974 following a clause granting

Statement of statutory purpose—As stated in § 3, 7 U.S.C. § 5 (SA2), Congress enacted the CEA because trading in futures contracts is "affected with a national public interest"; such trading is carried on by the "public generally" and by buyers and sellers of commodities, their products and by-products; futures prices are quoted and disseminated as a basis for determining prices to "the producer and the consumer"; such transactions are utilized by "shippers, dealers, millers" and other handlers of commodities and their products and by-products as a means of hedging against loss through price fluctuations; futures transactions and prices are susceptible to speculation, manipulation and control; sudden or unreasonable fluctuations in futures prices frequently occur as a result of such speculation, manipulation or control and are detrimental to "the producer or the consumer and the persons handling commodit[ies]"; and such price fluctuations are an obstruction to and a burden upon interstate commerce in commodities and render regulation imperative "for the protection of such commerce and the national public interest therein."

This identification of the broad public purposes of the CEA and of the public harm that may result from speculation hardly suggests an intent to provide a damage remedy for speculators or justifies the majority's conclusion that it is "almost self-evident that legislation regulating future trading was for the 'especial benefit' of futures traders." (JA 136)

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exclusive jurisdiction to the CFTC "not to approve private rights of action but rather to insure that the exclusive jurisdiction granted to the CFTC would not interfere with federal court jurisdiction over such matters as antitrust suits and enforcement actions taken by other regulatory agencies or with state court jurisdiction over contract and common law claims." (JA 232 n.19)

C. *The Legislative History of §§ 5(d), 5a(8) and 9(b) Does Not Permit the Inference of a Private Cause of Action*

There is no ambiguity in the statutory language or the statutory scheme necessitating resort to the legislative history of the CEA. Nonetheless, the legislative history of §§ 5(d), 5a(8) and 9(b) confirms the conclusion that these sections do not provide a private cause of action against a contract market or its officials.

The legislative history of the CEA, in 1921 when § 5(d) was enacted, in 1922 when the CEA was re-enacted to cure the constitutional defect in the 1921 statute, in 1936 when § 5a and the criminal proscription of manipulation in § 9(b) were enacted and in 1968 when paragraph (8) was added to § 5a, does not contain any indication that a private right of action was intended.

The determinative legislative intent is that of the Congress which enacted the statutory provision at issue. *Redington,* 442 U.S. at 575 n.16. *See also Southeastern Community College* v. *Davis,* 442 U.S. 397, 411 n.11 (1979); *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750 (1979). The majority below, however, wholly ignored the legislative history of the enactment of §§ 5(d), 5a(8) and 9(b).

Section 5(d)—Section 5(d) was first enacted as part of the Future Trading Act of 1921, ch. 86, 42 Stat. 187 *et seq.*, the first statute to bring commodity futures (then grain futures only) under federal regulation. The Senate Report stated generally that "[t]he purpose of this bill is to . . . authorize supervision of the grain-futures markets, but not disturb any of their legitimate and useful functions." S.Rep. No. 212, 67th Cong., 1st Sess. 4 (1921). Section 5 was designed to provide for "the designation for boards of trade as 'contract markets' upon certain conditions set out in subdivisions (a) to (f), inclusive." H.R.Rep. No. 345, 67th

Cong., 1st Sess. 7 (1921). Apart from conforming changes, § 5(d) has remained unchanged since its enactment in 1921.*

Significantly, the Packers and Stockyards Act of 1921, ch. 64, 42 Stat. 159 *et seq.*, provided in § 308, 7 U.S.C. § 209 that any stockyard, market agency, or dealer who violates specified sections of that Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation" and that such liability may be enforced either by suit in a federal court or by a reparations complaint to the Secretary of Agriculture under § 309, 7 U.S.C. § 210. No comparable private damage action was provided in the Future Trading Act (or any successor statute), although it and the Packers and Stockyards Act were drafted concurrently by the same congressional committees and were ultimately enacted by the same Congress during the same month of 1921.

This omission "weighs against the implication of a private right." *Transamerica Mortgage*, 444 U.S. at 20. There, the statute under review, the Investment Advisers Act of 1940, contained no private remedy, but "the Investment Company Act of 1940 which was enacted as companion legislation," as well as other securities statutes enacted previously, did authorize private suits for damages in specified circumstances. (*Ibid.*) The Court observed, quoting *Redington*, 442 U.S. at 572, " 'Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.' " (444 U.S. at 21)

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* In 1936, "commodity" was substituted for "grain" in § 5(d), as it was throughout the CEA (Commodity Exchange Act of 1936, ch. 545, 49 Stat. 1491, 1497). In 1974, when the Commodity Futures Trading Commission Act was enacted, "Commission" was substituted for "Secretary of Agriculture" or "Secretary" in § 5(d) and throughout the CEA (Commodity Futures Trading Commission Act of 1974, Pub.L.No. 93-463, 88 Stat. 1389).

After the Future Trading Act of 1921 was declared unconstitutional by reason of its reliance upon the taxing power, *Hill* v. *Wallace*, 259 U.S. 44 (1922), it was rewritten without any change in § 5 and reenacted as the Grain Futures Act of 1922, ch. 369, 42 Stat. 998 *et seq.*, which was later renamed the Commodity Exchange Act. The drafters of the Grain Futures Act modelled many of its provisions on the corresponding provisions of the Packers and Stockyards Act. *See Grain Futures Act: Hearings Before the House Committee on Agriculture*, 67th Cong., 2d Sess. 2-15 (1922). The omission from the Future Trading Act of a provision for a private damage action comparable to that appearing in the Packers and Stockyards Act was not supplied by the Grain Futures Act.

Section 5a(8)—Section 5a was enacted in 1936; paragraph (8) was added in 1968. Again, there is no indication that Congress intended a cause of action under § 5a in 1936 or § 5a(8) in 1968. The 1936 Reports merely give the substance of the § 5a(1)-(7) duties of contract markets which the House Minority Report viewed as "new and elaborately specific requirements as to furnishing records and allowing inspection of records." H. R. Rep. Nos. 1522, Part 2, 73d Cong., 2d Sess. 13 (1934); H. R. Rep. No. 1637, 73d Cong., 2d Sess. 31 (1934).* The 1968 Senate Report simply states that "[c]ontract markets should enforce their own rules, but they have not always done so. This section would place upon the contract markets a direct responsi-

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* *See also* H. Rep. No. 1522, 73d Cong., 2d Sess. at 7 (1934); H.R.Rep. No. 1637, 73d Cong., 2 Sess. 7 (1934); H.R.Rep. No. 421, 74th Cong., 1st Sess. at 7 (1935); S.Rep. No. 1431, 74th Cong., 1st Sess. (1935). The congressional debates are reported in 78 Cong. Rec. 10443 *et seq.* (1934); 79 Cong. Rec. 8586 *et seq.*, 14246 *et seq.* (1935); 80 Cong. Rec. 6159 *et seq.*, 6612 *et seq.*, 7845 *et seq.*, 7857 *et seq.*, 7905 *et seq.*, 7907 *et seq.*, 7916 *et seq.*, 7918 *et seq.*, 7925 *et seq.*, 8010 *et seq.*, 8288 *et seq.* (1936).

bility for the enforcement of rules . . . . This provision should further activity by the markets in maintaining the efficiency and dignity of the futures trading system . . . ." S. Rep. No. 947, 90th Cong., 2d Sess. 2-3 (1968); 113 Cong. Rec. 10838 *et seq.* (1967). The 1968 House Report states that

> "[t]he markets would be required to enforce all of their bylaws and rules which relate to contract terms and other trading requirements which have not been disapproved by the Secretary." (H.R. Rep. No. 743, 90th Cong. 1st Sess. 3 (1967))*

During the consideration of the 1968 amendments, Representative Fino introduced a bill that specifically provided a private damage remedy against contract markets. He stated:

> "The bill would make contract markets liable in damages for violations of the act, or negligence in connection therewith, to aggrieved persons." (113 Cong. Rec. 10839 (1967))

Section 32 of the bill, H.R. 9178, 90th Cong., 1st Sess. (1967), provided for the addition of a new section to the CEA:

> "Any contract market which engages in any act or practice constituting a violation of this Act, or any rule or order thereunder, or which negligently allows or aids, abets, counsels, commands or induces any such

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* The congressional debates are reported in 113 Cong. Rec. 10838 *et seq.*, 23560 *et seq.*, 34206 *et seq.*, 34390 *et seq.*, 34403 *et seq.* (1967). *See also Amend the Commodity Exchange Act: Hearings on H.R. 11930 and H.R. 12317 Before the House Committee on Agriculture*, 90th Cong., 1st Sess. 49-50 (1967); *Amend the Commodity Exchange Act: Hearings on H.R. 11788 Before the Subcommittee on Domestic Marketing and Consumer Relations of the House Committee on Agriculture*, 89th Cong., 2d Sess. (1966).

violation, shall be liable for consequential damages to any aggrieved person." *

Although many of the provisions of H.R. 9178 were enacted in their original form** or after modification,*** the proposal to create a private cause of action against contract markets was not enacted.

Section 9(b)—The legislative history of § 9(b) is also devoid of any evidence that Congress intended to provide a private right of action for its enforcement. Rather, Congress has sought to make § 9(b) effective by repeatedly escalating the penalties attached to its violation. When Congress first enacted the criminal proscription of manipulation in § 9(b) as part of the Commodity Exchange Act of 1936,**** violation of its terms was a misdemeanor. In

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* Hearings on proposals to amend the CEA were held in 1966 and 1967. Debates were held throughout 1967. Representative Fino's bill was introduced on April 26, 1967. In 1968, reports were issued, and the amendments to the CEA were enacted in final form.

** Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258 §§ 1(a), 1(b), 3, 6b, 7(a), 9, 10, 11, 13a, 14, 15, 18, 19, 22, 82 Stat. 26 *et seq.*

*** Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258 §§ 2, 4, 5, 7(b), 8, 16, 17, 20, 24, 25, 26, 27, 82 Stat. 26 *et seq.*

**** The Grain Futures Act of 1922 contained § 6(b), a provision authorizing the Secretary of Agriculture to suspend the trading privileges of any person found guilty of, *inter alia*, "attempting to manipulate the price of grain," and § 9, a provision making it a misdemeanor to violate certain sections of the Act or to communicate false, misleading or inaccurate crop or market information. In 1936, Congress amended § 9 to reach any person "who shall manipulate or attempt to manipulate the price of any commodity in interstate commerce or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner any such commodity. . . ." Commodity Exchange Act of 1936, ch. 545, § 11, 49 Stat. 1501. The 1968 amendments to the CEA incorporated the existing offense of price manipulation into a new subparagraph designated as § 9(b), changed the classification

its 1968 revision of the provision, Congress raised a number of offenses, including price manipulation, from misdemeanors to felonies punishable by up to five years' imprisonment. Commodity Exchange Act Amendments of 1968, Pub.L. No. 90-258, § 25, 82 Stat. 33. Six years later, Congress increased the possible fine for violating § 9(b) to $100,000. Commodity Futures Trading Commission Act of 1974, Pub.L. No. 93-463, § 212, 88 Stat. 1404. In 1978, Congress again increased the possible fine to $500,000 for violators who are not individuals. Futures Trading Act of 1978, Pub. L. No. 95-405, § 19, 92 Stat. 875.

The legislative history of § 9(b) contains a plain reminder to Congress of its legislative responsibility and the limited role of the courts, which is in striking contradiction of the majority's premise that Congress assumed the courts would take it upon themselves to fill gaps in the statute.

When Congress enacted the criminal proscription of manipulation in 1936 "to check manipulations of markets by certain big traders" (79 Cong. Reg. 8589 (1935)), it acted in response to "the well-known case against Arthur W. Cutten." (80 Cong.Rec. at 6160 (1936)*) The case, *Cutten* v. *Wallace*, 80 F.2d 140 (7th Cir. 1935), *aff'd sub nom. Wallace* v. *Cutten*, 298 U.S. 229 (1936), was an appeal from an administrative order made pursuant to § 6(b) suspending Cutten's trading privileges based upon findings of past, rather than on-going, price manipulation and other viola-

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thereof from a misdemeanor to a felony, and increased the term of imprisonment. Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258, § 25, 82 Stat. 33.

* *See also id.* at 1451; *To Amend the Grain Futures Act: Hearings on H.R. 6772 Before the Senate Committee on Agriculture and Forestry*, 74th Cong., 2d Sess. 16-17, 261-62 (1936); Report of the Chief of the Grain Futures Administration at 2 (1936).

tions. The Court of Appeals for the Seventh Circuit reversed the administrative ruling:

> "We cannot ignore the fact that Congress in dealing with contract markets provided for cancellation of rights if violations of regulations *had* occurred whereas in the next section the right to cancel a member's privilege on a contract market was limited to instances where the member *is* violating a regulation. . . . To extend the latter section to the breadth of the former would be usurping the function of Congress.
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> "Under such conditions it is for Congress to amend its legislation, if it deems it wise and desirable so to do, not for courts to do so by judicial construction." (80 F.2d at 143-44) (Citations omitted)*

This Court affirmed the decision of the court of appeals in *Wallace* v. *Cutten*, 298 U.S. 229 (1936). Justice Brandeis, speaking for the Court, summarily rejected the government's contentions and, as had the court of appeals, resolved the case on constitutional grounds: "'To supply omissions transcends the judicial function'" where "on the face of the statute, there can be no doubt concerning the intention of Congress." (*Id.* at 237) The opinion was brought to the attention of Congress prior to its enactment of the 1936 amendments to the CEA. 80 Cong.Rec. 7858 (1936); Report of the Chief of the Grain Futures Administration at 6 (1936).

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* This opinion was reprinted in full in *To Amend the Grain Futures Act: Hearings on H.R. 6772 Before the Senate Committee on Agriculture and Forestry*, 74th Cong., 2d Sess. 280-83 (1936) and summarized *id.* at 259-62. *See also* 80 Cong. Rec. 6160 (1936); Report of the Chief of the Grain Futures Administration at 4-5 (1935); Report of the Chief of the Grain Futures Administration at 6 (1936). Such explicit references to a well-known decision are a more accurate indicator of congressional awareness than the inferences to be drawn from silence.

When Congress enacted the manipulation proscription of § 9(b) in order to make criminal the activities of market manipulators like Arthur Cutten, these decisions were fresh in its mind. Had Congress wished to enforce § 9(b) through private damage actions as well as criminal prosecutions, it knew that it could not delegate its lawmaking function to the courts by relying upon them to supply the omission.

Each relevant factor identified in *Kissinger*—the statutory language, the statutory scheme and the legislative history—negates any inference that Congress intended to create a private damage cause of action against contract markets under §§ 5(d), 5a(8) or 9(b) of the CEA. "At least in such case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative." *Redington*, 442 U.S. at 576. *See also Transamerica Mortgage*, 444 U.S. at 23-24.

D. *The Enactment in 1974 of the Commodity Futures Trading Commission Act Does Not Permit the Inference of a Private Cause of Action under §§ 5(d), 5a(8) or 9(b)*

The court of appeals majority found it "unnecessary to dwell on just how far the recent triad of *Cannon*, *Redington* and *Transamerica* may have gone in limiting the implied cause of action." (JA 158) It went on to say: "We do think, however, that the rumors about the death of the implied cause of action which have been circulating in the wake of these decisions—an attitude strongly reflected in the dissent—are exaggerated. . . ." (*Ibid.*) The majority also said: "While we of course follow the most recent pronouncements of the Supreme Court, those pronouncements focus our attention on the question of legislative intent, and 'our evaluation of congressional action . . . must take into account its contemporary legal context.'" (JA 157)

The majority, however, did more than take context "into account." It used context as the single determinant of congressional intent, and it chose a particular "context" that permitted it to distinguish *Redington* and *Transamerica Mortgage* as involving statutes enacted *"prior* to the great explosion in judicial recognition of implied rights." (JA 159) It asserted that "the congressional action . . . involved in this case" was that which occurred in 1974 so that it might ignore the absence of any indication whatever in the legislative history of §§ 5(d), 5a(8) and 9(d) of an intent to imply a private remedy. (JA 159) The majority placed "[t]he burden . . . on those who urge that the 1974 amendments demonstrate an intention to change prior law. . . ." (JA 128)

But what was enacted in 1974 was the Commodity Futures Trading Commission Act (the "CFTCA"). The principal purpose of the CFTCA, as its name conveys, was to transfer enforcement of the CEA from the Secretary of Agriculture to the newly created CFTC. Coverage was also broadened from agricultural commodities to all goods subject to contracts for future delivery. The CFTCA, as the majority itself stated, "did not substantially alter any of the provisions which assertedly form the bases of an implied right of action." (JA 111)

If 1974, rather than the years of enactment of §§ 5(d), 5a(8) and 9(b), were the pertinent focus of inquiry, the "legal context" relied upon by the majority was more familiar to the author of the majority opinion than, so far as the legislative history indicates, it was to Congress.* The

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* In 1964, Judge Friendly delivered the Cardozo Lecture which he entitled *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383 (1964). He commented with respect to the second object of his praise:

> "One of the beauties of [the 'new federal common law'] for our day and age is that it permits overworked federal legislators,

majority asserted that in 1974 "a private cause of action" was "unanimously recognized" by the courts. (JA 125) In fact, only one appellate decision had "implied" a private damage cause of action against a contract market, *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds per curiam sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). The court of appeals in *Deaktor* addressed first the question whether the "Commodity Exchange Commission properly has primary jurisdiction over these proceedings" (479 F.2d at 531) and only after answering that question in the negative, ruled, relying upon the statutory tort concept rejected in *Redington*, that a private damage action was to be implied. This Court reversed the court of appeals on the primary jurisdiction issue and did not reach the second question. The assertion by the majority below that this Court "implicitly affirmed" (JA 123) an implied cause of action is unsupported by the *Deaktor* decision.*

The majority asserted that "the existence of an implied right of action under the [CEA] as it stood in 1974 was

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who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function—with Congress always able to set matters right if they go too far off the desired beam." (*Id.* at 419) (footnote omitted)

* In *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), a district court denied a motion to dismiss an action by the trustee in bankruptcy of a member-broker against a contract market. Citations in the opinions below (Majority at JA 121, Dissent at JA 219) indicating that this decision was *aff'd sub nom. Miller* v. *New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977) are inaccurate. Although the *Miller* and *Seligson* decisions were issued in the same case, *Miller* was an appeal from the dismissal of the action against the contract market after trial, not from the decision in *Seligson*. *Miller* did not address the question of whether there is an "implied" private cause of action under the CEA.

repeatedly called to the attention of and *implicitly* approved by Congress" (JA 128) (emphasis supplied) and that "the [1974] legislative history demonstrates beyond fair doubt that Congress relied on and approved the unanimous course of decisions recognizing private causes of action under the CEA, which in turn, were solidly based on the Supreme Court's decision in *Borak*." (JA 160) The dissent read the same history differently, saying "[t]he legislative history . . . fails to contain one word approving a private right of action, despite reference by a couple of witnesses and a senator to the subject." (JA 174-75)

There were references by Representative Poage, 119 Cong.Rec. 41333 (1973), and in the report of the House Committee on Agriculture, H.R.Rep. No. 975, 93d Cong., 2d Sess. 46, 48 (1974) ("House Report"), to a judicially created private remedy against contract markets. These references were, if anything, critical of the consequences to self-regulation. Among the considerations which led the Committee to propose granting the CFTC expanded authority over contract market rules were:

> "Growing difficulties facing exchanges engaged in self-regulatory actions as a result of private plaintiffs seeking damages against self-regulatory activities of the markets. As examples, exchanges are sued for actions taken in emergency situations even when the action has been taken at the request (or order) of [the Commodity Exchange Authority, the predecessor of the CFTC]." (House Report 48)

Senator Clark was one of the sponsors of S.2837, 93d Cong., 1st Sess. (Dec. 20, 1973),* which in § 505 provided

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* S. 2837 appears at pages 79-124 of *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. (1974) ("Senate Hearings").

expressly for civil actions for restitution or for treble damages (if the violation was willful) by any person injured by a violation of the Act or regulation or order thereunder. In a statement as a "single legislator", *Chrysler Corp.* v. *Brown*, 441 U.S. at 311, he criticized the House bill for not providing for treble damage actions as an enforcement tool, pointing out that § 201 of the bill "may prohibit all court actions." (Senate Hearings 205) Professor Schotland, one of many witnesses, was a proponent of the private damage action provision of § 505 of S. 2837 and also urged that if the reparations procedure of the House bill were adopted there be "explicit language" that federal and state courts were still open to private plaintiffs. (Senate Hearings 737, 746) As had happened with the private damage remedy against contract markets proposed by Representative Fino in connection with the 1968 legislation, the private damage action urged by Senator Clark and Professor Schotland was not enacted. The reparations procedure criticized by Professor Schotland was enacted.

Language limiting the exclusive jurisdiction of the CFTC was adopted, but the evidence is compelling that it was adopted for reasons having nothing to do with "implied" rights of action. Section 201(B) of H.R. 13113 gave the CFTC "exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery" preserving, however, the jurisdiction of the SEC and other federal and state regulatory authorities. This exclusive jurisdiction provision was severely criticized by Chairman Rodino of the House Judiciary Committee, who pointed to three difficulties: "a question of federal-State relationships" was raised since many commodity futures contracts "are presently enforceable in State courts under recognized commercial law and contract principles"; the provision "could possibly be read as an attempt to oust even federal courts of jurisdiction" al-

though "antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws"; and "if jurisdiction of federal courts were to be withdrawn also, Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law." (Senate Hearings 260) The testimony of the Deputy Assistant Attorney General and of the Director of the Bureau of Competition of the Federal Trade Commission before the Senate Committee was to the same effect.* (Senate Hearings 663-64, 667-68) Director Halverson was asked by Chairman Talmadge to work with the Committee staff to provide language "that will make clear laws, appeals to Federal courts and various boards, and State courts would still be authorized." (Senate Hearings 669) A sentence was added by the Senate to § 201 immediately after the exclusive jurisdiction provision reading: "Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." ** Chairman Talmadge stated of this sentence:

> "The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determina-

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* Section 15 of the Act, 7 U.S.C. § 19, reflects a similar concern for antitrust enforcement.

** The reference to "section" in § 2(a)(1) of the Act, 7 U.S.C. § 2, is not to that definitional section but rather to § 201 of the Commodity Futures Trading Commission Act of 1974, Pub.L.No. 93-463, 88 Stat. 1389.

tion by the courts are expressly preserved." (120 Cong.Rec. 30459 (1974))

In *Rivers* v. *Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), *pet. for cert. filed*, 49 U.S.L.W. 3712 (U.S., Mar. 24, 1981) (No. 80-1542), the Court of Appeals for the Fifth Circuit held that there is no "implied" private cause of action under § 4b of the CEA, 7 U.S.C. § 6b (SA 6). With respect to the legislative history relied upon by the majority below, the Court in *Rivers* concluded:

> "The foregoing analysis of the language, structure and legislative history of the 1974 version of the CEA and its 1978 amendments obviously has yielded a result that might be described as emphatically equivocal. Although some individual passages or aspects of the Act appear to give some insight, these inferences frequently conflict with those from other passages or, upon closer examination, their apparent persuasiveness dims or vanishes. Chief Justice Marshall once observed that '[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived. . . .' *United States* v. *Fischer*, 2 Cranch 358, 386, 2 L.Ed. 304 (1805), *quoted in Brown* v. *General Services Administration*, 425 U.S. 820, 825, 96 S.Ct. 1961, 1964, 48 L.Ed.2d 402 (1976). After our analysis of the legislative material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design—a singularly inappropriate base upon which to predicate an implied private cause of action.
>
> "The net result of our study and deliberation in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all

> of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case . . .—given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action —we are bound to refuse plaintiffs' suit." (634 F.2d at 792)

There is no indication whatsoever in the legislative history that Congress had in mind, much less "relied on and approved", Justice Clark's opinion in *J.I. Case* v. *Borak Co.*, 377 U.S. 426, 433 (1964) ("it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose"), or Judge Clark's opinion in *Baird* v. *Franklin*, 141 F.2d 238, 245 (2d Cir.) (Clark, J., dissenting in part), *cert. denied*, 323 U.S. 737 (1944) ("the common law will supply a remedy if the statute gives none"). Nonetheless, the majority below made those opinions, particularly *Borak*, which are plainly in error under this Court's more recent decisions, part of the "legal context" that Congress supposedly approved through its silence.

The majority, however, for all practical purposes, excluded from its "legal context" this Court's *Amtrak* decision, which was handed down in January 1974. (JA 157-58) There, the Court refused to infer a private cause of action, saying:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills* v. *United States*, 278 U.S. 282, 289 (1929)." (414 U.S. at 458)

In April 1974, three months after the *Amtrak* decision and before the enactment of the CFTCA, Judge Aldisert expressed the view that in *Amtrak* the Court had "consciously and deliberately applied the brakes and meant exactly what it said when it declared that a 'private cause of action not otherwise authorized by the statute' may not be implied in the absence of clear 'evidence of legislative intent.'" *Ash* v. *Cort*, 496 F.2d 416, 429 (3d Cir. 1974) (Aldisert, J., dissenting), *rev'd*, 422 U.S. 66 (1975).

The majority relied upon *Cannon* as authority for its recourse to "contemporary legal context." (JA 159) The Court of Appeals for the Fifth Circuit pointed out in *Rivers* the distinction between the legislative history involved in *Cannon* and that of the CFTCA:

> "In *Cannon*, for example, the Court observed that Congress '*explicitly* assumed that [the statute in question] would be interpreted and applied as' had the statute upon which it was patterned, including the judicial recognition or creation of an implied cause of action thereunder. 441 U.S. at 693-696, 99 S.Ct. at 1956-57 (emphasis added). We have received no such message from the enactors of the CFTCA." (634 F.2d at 789)

The *Rivers* court pointed out as well that "the wisdom of *imputing* to Congress the knowledge upon which we then, in turn, *assume* that legislation is predicated, seems dubious." (*Id.* at 786 n.21) (Emphasis in original)

In *Cannon* and in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), also relied upon by the majority (JA 145), the Court in considering legislative history looked to the enacting Congress. The statutes before the Court had been patterned after other statutes that had been construed by the courts to provide relief deemed appropriate by Congress. This intention was made "explicit", *Cannon*, 441 U.S. at 696, and Congress "exhibited both a detailed knowledge of the . . .

provisions [of the model statute] and their judicial interpretation." *Lorillard*, 434 U.S. at 581. In contrast, the majority below ignored the legislative history of the enactment of §§ 5(d), 5a and 9(b) and relied upon what it found was the "implicit" intention of the 1974 Congress in enacting the CFTCA, although in 1974 Congress "did not substantially alter any of the provisions" of the CEA which are in issue. (JA 111)

The majority invoked the "well recognized canon of statutory construction that the reenactment of a statute incorporates preceding judicial interpretations." (JA 144) The applicability of the canon is, however, entirely doubtful. Sections 5(d), 5a(8) and 9(b) of the CEA were not "reenacted" by the CFTCA, and the *Deaktor* decision was not an "interpretation" but rather the creation of a remedy pursuant to a common law doctrine.

This Court said in *Kissinger*, 445 U.S. at 149, and in *Transamerica Mortgage*, 444 U.S. at 20, that the *expressio unius* canon of statutory construction yields only to "persuasive evidence of a contrary legislative intent." That canon is entirely consistent with the reenactment canon, if it were applicable here, for, as the Court held in *Cannon*, the reenactment canon applies where there is "explicit" evidence that Congress intended to approve prior judicial construction of a statute. The majority's reliance upon the reenactment canon in the face of the express remedies of the CEA and in the absence of "explicit" evidence that Congress intended to approve the judicial implication by a single court of appeals of a cause of action against contract markets turns these rules on their heads.*

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* Reliance on the reenactment canon is singularly inappropriate when, as here, the prior judicial interpretation is not longstanding or pervasive. *See Aaron* v. *SEC*, 446 U.S. 680, 700 n.18 (1980); *SEC* v. *Sloan*, 436 U.S. 103, 121-22 (1978); *T.I.M.E. Inc.*, 359 U.S at 478.

E. *The Judicial Implication of a Private Cause of Action Is Impermissible*

The majority sought to breathe new life into the "implied cause of action", saying that rumors of its death are "exaggerated at least as far as previously enacted statutes are concerned . . . ." (JA 158) Its decision stands for the proposition that the reasoning of such decisions as *Borak* remains valid provided the statute in question was enacted in "the late 1940's, the 1950's, the 1960's [or] the early 1970's" (JA 113) and before "the recent triad of *Cannon*, *Redington* and *Transamerica*" (JA 158) and, perhaps, absent clear evidence that Congress intended to deny a private remedy. Presumed congressional awareness of *Borak* as part of the "legal context" and "implicit" approval of its reasoning are substituted for express enactment. Silence is made the equivalent of legislation.

With *Borak* thus made positive law, not only are previously "implied" causes of action to survive, but new "implied" causes are to be sustained. As an example, the majority cited with approval *Zeffiro* v. *First Pennsylvania Banking and Trust Co.*, 623 F.2d 290 (3d Cir. 1980), which it described as holding that an "injured debenture holder can bring implied cause of action under Trust Indenture Act [of 1940] against indenture trustee who breaches agreement." (JA 158-59)

But, as the dissent pointed out, "[a]bsent evidence of clear intent, judicial creation of a private remedy amounts to an assumption or usurpation of the legislative function in violation of the separation of powers doctrine." (JA 177) The decision of the majority violated that doctrine and invites its continuing violation.

The majority spoke approvingly of "the process of delineating the precise contours of the private cause of action under the CEA, aided of course by the securities law

analogy . . . ." (JA 119 n.15) The Court of Appeals for the Sixth Circuit, which in a 2-1 decision sustained a private right of action under § 4b (SA 6) of the CEA also approved "the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5." *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 236 (6th Cir. 1980), *pet. for cert. filed*, 49 U.S.L.W. 3053 (U.S., Aug. 9, 1980) (No. 80-203).

If this process of judicial legislation is followed the lower courts and ultimately this Court will be faced with questions akin to those presented by the "implied" § 10(b) cause of action. *See, e.g., Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977).

This process is impermissible. It also presents grave problems for the administration of justice. When the ambiguities of an "implied" cause of action are coupled with the immense damage claims which the class action device permits, there are extraordinary pressures compelling settlement whatever the merits, as this Court has recognized. *Blue Chip Stamps, supra*, 421 U.S. at 740-43. Any practitioner in securities class action litigation is aware that such actions are commonly settled for amounts which are relatively small percentages of the theoretical class claim but which in absolute terms are very considerable indeed and certainly sufficient to permit the award of substantial attorneys' fees to counsel for the plaintiff class.

In the securities field, the class claimant universe is generally limited to purchasers or sellers of a particular security. Here the class claimants, so the majority below suggested, may include not only traders on the contract

market in a particular futures contract but all those, like Incomco, interested in the cash commodity itself, so long as the price of the commodity is indirectly affected by the wrongdoing the contract market supposedly failed to prevent. An "implied" cause of action of these dimensions does indeed contemplate liability for "hundreds of millions of dollars", as the dissent pointed out. (JA 183)

The decision below shows that there remains considerable reluctance on the part of the lower courts to give up the judicial implication of private causes of action. Unstated but underlying this reluctance is the mistaken belief that the federal courts must provide a forum and a remedy, although Congress has provided none, for every grievance that has some relationship to federal legislation or regulation.

As is shown by the decision below, the search for congressional intent beyond its expression in statutory language permits this reluctance to become the basis for decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

Provisions of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*

Section 2(a)(1), 7 U.S.C. § 2

§ 2. *Definitions*

For the purposes of this chapter "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs. Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13-1 of this title, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in: *Provided,* That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option",

"privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. . . .

Section 3, 7 U.S.C. § 5

§ 5. *Resolution declaring dangerous tendency of dealings in commodity futures*

Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and the products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the pro-

ducer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

Section 4a, 7 U.S.C. § 6a

§ 6a. *Excessive speculation as burden on interstate commerce; trading or position limits; control; hedging transactions; application of section*

(1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall, from time to time, after due

notice and opportunity for hearing, by order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or different trading limits for buying and selling operations, or different limits for the purposes of subparagraphs (A) and (B) of paragraph (2) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) The commission shall, in such order, fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided,* That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

(3) No order issued under paragraph (1) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission within one hundred and eighty days after the effective date of the Commodity Futures Trading Commission Act of 1974 by order consistent with the purposes of this chapter.

(4) This section shall apply to a person that is registered as a futures commission merchant or as floor broker under authority of this chapter only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

Section 4b, 7 U.S.C. § 6b

§ 6b. *Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities*

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Section 5, 7 U.S.C. §7

§ 7. *Designation of board of trade as "contract market"; conditions and requirements*

The Commission is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under

such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture or the Commission for the purpose: *Provided*, That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Commission.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Commission may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Commission, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Commission may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or

for a longer period if the Commission shall so direct, and shall at all times be open to the inspection of any representative of the Commission or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided*, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a

of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter.

(g) When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest.

Section 5a, 7 U.S.C. § 7a

§ 7a. *Duties of contract markets*

Each contract market shall—

(1) *Bylaws, rules, etc.; furnishing copies to Commission*

Promptly furnish the Commission copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

(2) *Access for inspection of books and records*

Keep all books, records, minutes, and journals or proceedings of such contract market, and its governing board, committees, subsidiaries, and affiliates in a manner that will clearly describe all matters discussed by such contract market, governing board, committees, subsidiaries and affiliates and reveal any action taken in such matters, and allow inspection at all times by any authorized representative of the Commission or United States Department of Justice of all such books, records, minutes, and journals of proceedings. Such books, records, minutes and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct;

(3) *Books and records of warehouses; keeping and inspection*

Require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Commission may prescribe. Such books and records shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and such books, records, and warehouses shall be open at all times to inspection by any representative of the Commission or United States Department of Justice;

(4) *Periods of delivery; provisions for*

When so directed by order of the Commission, provide for a period, after trading in contracts of sale of any commodity for future delivery in a delivery month has ceased, during which contracts of sale of such commodity for future delivery in such month may be satisfied by the delivery of the actual cash commodity. Whenever, after due notice and opportunity for hearing, the Commission finds that provision for such a period of delivery for any one or more commodities or markets would prevent or tend to prevent "squeezes" and market congestion endangering price stability, he shall, by order, require such period of delivery (which shall be not less than three nor more than ten business days) applicable to such commodities and markets as it finds will prevent or tend to prevent such "squeezes" and market congestion: *Provided, however,* That such order shall not apply to then existing contracts;

(5) *Notice of date of intended delivery*

Require the party making delivery of any commodity on any contract of sale of such commodity for future de-

livery to furnish the party obligated under the contract to accept delivery, written notice of the date of delivery at least one business day prior to such date of delivery. Whenever, after due notice and opportunity for hearing, the Commission finds that the giving of longer notice of delivery is necessary to prevent or diminish unfair practices in trading in any one or more commodities or markets, it shall by order require such longer notice of delivery (which shall be not more than ten business days) applicable to such commodities and markets as it finds will prevent or diminish such unfair practices: *Provided, however,* That such order shall not apply to then existing contracts;

(6) *United States standards; conformity of grades to*

Require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards shall have been officially promulgated and adopted by the Commission;

(7) *Warehouse receipts as satisfaction of futures contract*

Require that receipts issued under the United States Warehouse Act [7 U.S.C. §§ 241 *et seq.*] shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any state or enjoys other or different privileges than under State law: *Provided, however,* That such receipts shall be for the kind, quality, and quantity of commodity specified in such contract and that the warehouse in which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suita-

bility for warehousing and delivery purposes: *And provided further,* That this paragraph shall apply only to futures contracts for those commodities which may be delivered from a warehouse subject to the United States Warehouse Act;

(8) *Enforcement of bylaws, etc., relating to trading requirements*

Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission;

(9) *Enforcement of bylaws, etc., providing minimum financial standards and related reporting requirements*

Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Commission;

(10) *Delivery points*

Permit the delivery of any commodity, on contracts of sale thereof for future delivery, of such grade or grades, at such point or points and at such quality and locational price differentials as will tend to prevent or diminish price

manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce. If the Commission after investigation finds that the rules and regulations adopted by a contract market permitting delivery of any commodity on contracts of sale thereof for future delivery, do not accomplish the objectives of this paragraph, then the Commission shall notify the contract market of its finding and afford the contract market an opportunity to make appropriate changes in such rules and regulations. If the contract market within seventy-five days of such notification fails to make the changes which in the opinion of the Commission are necessary to accomplish the objectives of this paragraph, then the Commission after granting the contract market an opportunity to be heard, may change or supplement such rules and regulations of the contract market to achieve the above objectives: *Provided,* That any order issued under this paragraph shall not apply to contracts of sale for future delivery in any months in which contracts are currently outstanding and open: *And provided further,* That no requirement for an additional delivery point or points shall be promulgated following hearings until the contract market affected has had notice and opportunity to file exceptions to the proposed order determining the location and number of such delivery point or points;

(11) *Settlement of customers' claims and grievances*

Provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any

claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or a floor broker; and

(12) *Commission approval of bylaws, rules, regulations, and resolutions*

Except as otherwise provided in this paragraph, submit to the Commission for its approval all bylaws, rules and regulations, and resolutions made or issued by such contract market, or by the governing board thereof or any committee thereof which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements except those relating to the setting of levels of margin. At least thirty days before approving any such bylaws, rules, regulations, and resolutions of major economic significance, as determined by the Commission, the Commission shall publish in the Federal Register such bylaws, rules, regulations, and resolutions. The Commission shall give interested persons an opportunity to participate in the approval process through the submission of written data, views, or arguments. The determination by the Commission whether any such bylaws, rules, regulations, or resolutions are of major economic significance shall be final and not subject to judicial review. The Commission shall approve, within thirty days of their receipt (or within sixty days of their receipt if the Commission determines them to be of major economic significance) unless the Commission notifies the contract market of its inability to make such determination within such period of time, such bylaws, rules, regulations, and resolutions upon a determination that such bylaws, rules, regulations, and resolutions are

not in violation of the provisions of this chapter or the regulations of the Commission and thereafter the Commission shall disapprove, after appropriate notice and opportunity for hearing, any bylaw, rule, regulation, or resolution which the Commission finds at any time is in violation of the provisions of this chapter or the regulations of the Commission. The Commission shall specify the terms and conditions under which a contract market may, in an emergency, as defined by the Commission, adopt a temporary rule dealing with trading requirements without prior Commission approval. In the event of such an emergency, as defined by the Commission, requiring immediate action, the contract market by a two-thirds vote of its governing board may place into immediate effect without prior Commission approval a temporary rule dealing with such emergency if it notifies the Commission of such action with a complete explanation of the emergency involved. The Commission may adopt a regulation exempting enumerated types of contract market operational and administrative rules from the requirement that they be submitted to the Commission for its approval.

Section 5b, 7 U.S.C. § 7b

§ 7b. *Suspension or revocation of designation as "contract market"*

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a "contract market" in accordance with the procedure and subject to the judicial review provided in section 8 of this title.

Section 6, 7 U.S.C. § 8

§ 8. *Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals*

Any board of trade desiring to be designated a "contract market" shall make application to the Commission for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing on the record before the Commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The Commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing on the record: *Provided,* That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the Commission such board of trade appeals to the court of appeals for the circuit in which it has its principal place of business, by filing with

the clerk of such court a written petition praying that the order of the Commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of title 28. The testimony and evidence taken or submitted before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order. No such order of the Commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the Commission.

Section 6b, 7 U.S.C. § 13a

§ 13a. *Nonenforcement of rules of government or other violations; cease and desist orders; fines and penalties; imprisonment; misdemeanor; separate offenses*

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has vi-

olated any of the provisions of this chapter or any of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing on the record and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and assess a civil penalty of not more than $100,000 for each such violation. If such contract market, director, officer, agent, or employee, after the entry of such a cease and desist order and the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such cease and desist order continues shall be deemed a separate offense. If the offending contract market or other person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court. In determining the amount of the money penalty assessed under this section, the Commission shall consider the appropriateness of such penalty to the net worth of the offending person and the gravity of the offense, and in the case of a contract market shall further consider whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties.

Section 6c, 7 U.S.C. § 13a-1

§ 13a-1. *Action to enjoin or restrain violations; compliance; writs and orders; jurisdiction and venue; process*

Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided*, That no restraining order or injunction for violation of the provisions of this chapter shall be issued *ex parte* by said court. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take such action as is necessary to remove the danger of violation of this chapter or any such rule, regulation, or order: *Provided*, That no such writ of mandamus, or order affording like relief, shall be issued *ex parte*. Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district

where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found. In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action. Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments.

Section 6d, 7 U.S.C. § 13a-2

§ 13a-2. *Jurisdiction of States*

(1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, or floor broker) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this chapter, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

(2) The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this chapter or any rule, regulation, or order of the

Commission thereunder, or to obtain damages or other relief with respect thereto. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that the defendant take such action as is necessary to remove the danger of violation of this chapter or of any such rule, regulation, or order. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Immediately upon instituting any such suit or act, the State shall serve written notice thereof upon the Commission and provide the Commission with a copy of its complaint, and the Commission shall have the right to (A) intervene in the suit or action and, upon doing so, shall be heard on all matters arising therein, and (B) file petitions for appeal.

(4) Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(5) For purposes of bringing any suit or action under this section, nothing in this chapter shall prevent the attorney general, the administrator of the State securities laws, or other duly authorized State officials from exercising the powers conferred on them by the laws of such State to conduct investigations or to administer oaths or affirma-

tions or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) For purposes of this section, "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(7) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general, civil or criminal antifraud statute of such State.

Section 9(b), 7 U.S.C. § 13(b)

§ 13(b). *Price manipulation; cornering; postal or interstate dissemination of false or misleading information affecting price of commodity in interstate commerce; felony*

(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any applica-

tion or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

Section 14, 7 U.S.C. § 18

§ 18. *Complaints against registered persons*

(a) *Petition*

Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

(b) *Investigation and hearing*

If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: *Provided,* That in complaints wherein the amount claimed as damages does not

exceed the sum of $5,000, a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

(c) *Determination*

After opportunity for hearing on complaints where the damages claimed exceed the sum of $5,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $5,000 not requiring hearing as provided herein, the Commission shall determine whether or not the respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

(d) *Bond requirement when complainant is nonresident; waiver*

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: *Provided,* That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(e) *Reparations*

If after a hearing on a complaint made by any person under paragraph (a) of this section, or without hearing

as provided in paragraphs (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

(f) *Enforcement of reparation award*

If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is

located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under paragraph (g) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(g) *Review*

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be

allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(h) *Penalty*

Unless the registrant against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order, he shall be prohibited from trading on all contract markets and his registration shall be suspended automatically at the expiration of such fifteen-day period until he shows to the satisfaction of the Commission that he has paid the amount therein specified with interest thereon to date of payment: *Provided,* That if on appeal the appellee prevails or if the appeal is dismissed the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(i) *Effective date*

The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided,* That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period.

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Nos. 80-757, 80-895, 80-936

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-757

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-895

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-936

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER, INC.,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

BRIEF OF RESPONDENTS NEIL LEIST, PHILIP SMITH AND INCOMCO

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Question Presented

In comprehensively rewriting the Commodity Exchange Act ("Act" or "CEA") in the "contemporary legal context" of 1973-74, for the purpose of enacting "remedial" legislation to strengthen deterrence against the very evils at bar, did Congress continue the theretofore well-recognized implied private action against brokerage houses and/or commodity exchanges?

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Fitzgerald, *The Judicial Process In Statutory Construction*, U. Ill. L. F. 433 (1960) 2

Materials on Legislation, p. 753, Foundation Press (1973) 2

Pitt, *Standing to Sue Under the Williams Act After Chris-Craft*, 34 Bus. Law 117, 121 (1978) 22

Commodity Futures Trading Commission ("CFTC"), 1979 Annual Report 39

Statutes and Rules:

Commodity Futures Trading Commission Act ("CFTCA") 1, 26

Commodity Exchange Act, as amended:

4a 7 U.S.C. §6a 1

4b 7 U.S.C. §6b 1

5(d) 7 U.S.C. §7(d) 1, 2

5a(8) 7 U.S.C. §7a(8) 1

5a(11) 7 U.S.C. §7a(11) 34, 38

9(b) 7 U.S.C. §13(b) 1

Rule 23 of Federal Rules of Civil Procedure 25

Rules of the New York Mercantile Exchange:

Rule 44.02 11

Rule 51.14 14

Statement of the Case

Petitioners, who are some of the defendants below, appeal from so much of the Second Circuit Court of Appeals decision in *Leist* v. *Simplot*, 638 F.2d 283 (2d Cir. 1980) (JA 83-173),* *rehearing and rehearing en banc denied*, Feinberg, C.J., Sept. 9, 1980 (JA 259-63) as upheld an implied private suit for damages resulting from

(i) commodity exchanges' violations of Sections 9(b), 5(d) and 5a(8) of the CEA, 7 U.S.C. §§13(b), 7(d) and 7a(8) (involving petitioners New York Mercantile Exchange, Inc. ("Exchange") and certain of its officials as defendants in the two actions now comprising No. 80-757), and

(ii) futures commissions merchants' violations of Sections 4a, 4b and 9(b) of the CEA, 7 U.S.C. §§6a, 6b and 13(b) (involving petitioners Heinold Commodities, Inc., Thomson & McKinnon Auchincloss Kohlmeyer, Inc. and Clayton Brokerage Co., Inc. in the actions comprising Nos. 80-936 and 80-895).

Other implied private actions under the CEA (including those against large manipulators, such as defendants J. R. Simplot and P. J. Taggares here, see *infra*) are NOT addressed or at issue on this appeal.

Respondents, plaintiffs below, are victims of—and cannot redress in "reparations", arbitration or anywhere EXCEPT this action—the very evils which have been the ***raison d'etre*** for federal commodity futures regulation since 1922, and which troubled Congress during enactment of the Commodity Futures Trading Commission Act ("CFTCA") in 1973-74:

(a) "large traders" who conspire to manipulate futures contract prices (JA 130-33); and

* Joint Appendix of relevant documents assembled by all counsel at bar. References are to page numbers.

(b) brokerage houses and exchanges which join in or feign ignorance of, that manipulation.[1]

See 7 U.S.C. §5; Hearings before the Senate Committee on Agriculture and Forestry (93rd Congress, Second Session) on S.2485, S.2578, S.2837 and H.R. 13113, pp. 201 (opening statement of Senator Clark), 474-477.

The manipulation here is uniquely EGREGIOUS because it involves the "notorious Maine potato futures default," the largest default in the annals of commodity futures trading. See *Wachovia Bank and Trust Company* v. *National Student Marketing Corp.*, —— F.2d ——, [Cur-

1. These evils and the commodity futures trading industry (especially the unparalleled incidence of swindling therein, which makes securities exchanges look like a Sunday School picnic, see *infra* this footnote) are the "first" and "most important factor" to be understood in an appellate court's statutory interpretation of the CEA. See Llewellyn, *Remarks On The Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vanderbilt L. Rev. 395, 397-99 (1950); Fitzgerald, *The Judicial Process In Statutory Construction*, U. Ill. L. F. 433 (1960) quoted in *Materials on Legislation*, at pp. 753-55, by Horace E. Read, John W. MacDonald Jefferson, B. Fordham and William J. Pierce, Foundation Press, 1973. In over 150 pages of submissions, petitioners and *amici* have conspicuously omitted "this first and most important factor" in "every" appellate decision hinging on interpretation of a statute, *i.e.*, an analysis of the egregious fact situation, the commodity futures industry generally and their "relationship to . . . the rest of society as it presently exists". Llewellyn, *supra*. These evils rendered unsuccessful the exchanges' pleas to be immunized from private suit (JA 138-141) and from the antitrust laws, Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture, 93rd Cong., 1st Sess., at 121; Hearings Before the Senate Committee on Agriculture and Forestry, 92nd Congress, 2d Sess., on S.2485, S.2578, S.2837 and H.R. 13113 ("Senate Hearings"), pp. 251-262, 317; JA 117.

Regarding the swindling, a trip to the trading pit of one of the exchanges to observe the floor traders (those persons responsible for handling the annual $1.5 trillion futures business, *New York Times*, Feb. 23, 1981, p. D-1, col. 8, reporting the granting of *certiorari* herein) is instructive. The whispering, the suspicious looks with which they regard outsiders, the bedlam defying close scrutiny and the almost palpable air of insider preference, collusion and cheating will vividly demonstrate what reading newspapers and current litera-

(footnote continued on next page)

rent] Fed. Sec. L. Rep. (CCH) ¶97,712 at p. 98,736 (D.C. Cir. 1980) (decided by Judge Abner Mikva who was a member of Congress in 1973-74 and who quotes extensively and favorably from the Second Circuit opinion below).

Briefly, this was a DEFAULT of unbelievable proportions after a conspiratorial accumulation of the ENTIRE short side of the May 1976 Maine Potato Futures Contract ("Contract") by the country's two biggest and most powerful potato processors (JA 95), co-conspirators J. R. Simplot and P. J. Taggares, and their companies, children, other family members, friends, cronies and debtors, and their partnerships in concert with, principally, four brokers (only

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ture suggest. *E.g.*, some recent samples: "Despite His 'Image' [allegations of fraud in commodity options and a squeeze in wheat futures], Rosenthal Seems Sure to Head Chicago Board of Trade", *The Wall Street Journal*, December 31, 1980, at page 5, cols. 2-3; "Who Guards Whom At The Commodity Exchange", *Fortune*, July 28, 1980; "The Insider Issue In Commodity Futures", *Business Week*, July 7, 1980; *The Silver Bulls* by Paul Sarnoff, November, 1980, Arlington Press (recounting how major silver futures manipulators and exchange insiders almost collapsed the nation's financial markets, knowingly aided and abetted by exchange officials); "11 Cotton Brokers Indicted Charged With Rigging Trades" December 30, 1980, *The New York Times*, D-9, cols. 2-3; *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979).

Thus, after the first Chairman of the Commodity Futures Trading Commission ("CFTC"), William T. Bagley, reviewed the situation on the theretofore largely unregulated New York exchanges in 1975, he was widely quoted as saying that "all the New York exchanges should be closed up". *E.g.*, Sarnoff, *Silver Bulls, supra* at p. 19; *see* Senate Hearings at pp. 307-308, 345-346, 368-369, 581-582, 758. Similarly, a Congressman quoting from the July 29, 1974 Report of the Senate Permanent Subcommittee on Investigations concerning grain transactions, shrewdly observed as follows:

> "The Subcommittee finds that . . . self regulation by the commodity exchanges themselves to prevent abuses in futures trading . . . [is] . . . 'fox in the chicken coop' regulation." Senate Hearings, p. 758.

See also, *Rosee* v. *Chicago Board of Trade*, 36 F.R.D. 684 (N.D. Ill. 1965); *see* Senate Hearings, pp. 629-660.

Contrary to their quasi-governmental and not-for-profit institution claims, commodity exchanges are in reality collections of the most profit-oriented individuals on earth, who each pay hundreds of thousands of dollars for their membership. The unifying principle for those who create, maintain and govern the exchanges is simple:

(footnote continued on next page)

three of whom are petitioners here)—all with the invaluable aid of Exchange officials, and played out before a paralyzed or inept CFTC.

Facts[2]

Background

Potatoes are perishable, being harvested in the autumn and rotting in spring (usually May or June) of the year.

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profits. *See* Sarnoff, *Silver Bulls, supra* at 26-27, 35-36, 40-41; compare, Senate Hearings, at pp. 203, 307-308.

In fact, each exchange consists of competing constituencies—of late, retail houses (*e.g.*, Merrill Lynch), trade and specialist houses (*e.g.*, Conti, Moccatta, the historical main customers) and the anonymous but ascendant floor brokers (the so-called "scalpers", but also the persons populating exchange committees and most dominant in determining exchange policy, and most interested in the Exchange *qua* exchange, *i.e.*, as a money-making vehicle)—whose only motive in influencing policy and enforcement (or *lack* thereof or discrimination therein) is, as noted, to *profit* themselves. See, "Silver Study Warns of Repeat of Chaos", June 2, 1981 *The New York Times*, p. D-7, col. 1; Hearings before a Subcommittee on Government Operations, House of Representatives, 96th Congress, 2nd Sess. (indicating that exchange insiders may have calculated market regulation to benefit their short positions in a struggle against the Hunts (longs) in 1979-80 silver futures contracts).

This insider tug-of-war offers irresistible incentive reciprocally to pretend or simulate regulatory enforcement, feign negligence, or pervert self-regulation into a tool for accomplishing a manipulation. *Ibid.*; Sarnoff, *Silver Bulls, supra*; "Who Guards Whom At The Commodity Exchange", *supra; Just Plain Folks,* NBC, May 30, 1981, 10:00-11:00 P.M. (recounting the various manipulations of the Hunts of Dallas, including silver futures, with their confederate Norton Waltuch, the ever-available exchange insider); *Strax* v. *Comex et al. (Hunt & Waltuch)*, 79 Civ. 5366 (S.D.N.Y.) (MEL); *Pollock* v. *Citrus Exchange (Waltuch)*, 78 Civ. 0178 (S.D.N.Y.) (LWP); *Friedman* v. *Bache (Hunt)*, 80 C 1111 (N.D. Ill.) (J. McMillen). In the instance of petitioner New York Mercantile Exchange and its officials, the profit incentive rendered it extraordinarily difficult to provide market regulation: 80% of the Exchange's revenues were generated by the Maine potato contract of which, by far, the largest portion came from the May contract (which has since been discontinued, due to the ease of manipulation thereof). *The Wall Street Journal*, May 27, 1976 at p. 3, col. 2. See *infra*, pp. 8-12.

2. Taken from pleadings (JA 7-59), certified record from both lower courts, majority opinion below (JA 87-173), and submissions of pre-trial input and investigation (JA 3).

The Contract required delivery of one rail carload (equal approximately to 50,000 pounds or 500 hundred weights ("cwt.")) of Grade A Maine potatoes to New York City between approximately May 10 and June 5, 1976.

Contract trading commenced in February, 1975 (*i.e.*, three months before the 1975 crop was planted) and ended on May 7, 1976. Trading opened and proceeded uneventfully, with prices ranging from $5.92 to $9.00 per cwt., until August 11, 1976, when the United States Department of Agriculture ("U.S.D.A.") planting report was released. It recorded an unprecedented low acreage of planted Maine potatoes which, combined with poor growing weather indicating a low yield, presaged record shortages. Contract prices thereafter exploded, cresting at an all-time record high of $19.15 per cwt. on October 2, 1976.

Accompanying this record shortage were reports of an impending European potato famine, which threatened to whip-saw the supply-demand calculation and drive Maine potato prices to astronomical levels. As fall progressed into winter, various European countries (where the potato is still a staple) gradually relaxed restrictions against imports of American potatoes.

Maine potatoes possessed significant locational and labor charge advantages for export shipping costs to Europe. More important, Maine potatoes possessed a long "shelf life" in that they were sorted and packaged "unwashed" (whereas the sorting and packing facilities in Washington and Idaho "washed" potatoes by employing water conveyor belts, broke dormancy, and caused the potatoes to spoil much more quickly, virtually destroying their ability to withstand boat shipment to Europe).

Short Conspiracy

Cash Potato Operations and Past Manipulations of Simplot, Taggares and Ramm

Consistent with the functions of a futures market, Contract prices were nationally reported, read by potato growers and merchandisers, and provided competitive market and price discovery throughout the United States of what the price of Maine round white U.S. No. 1 potatoes delivered per the Contract terms to New York City were predicted to be between May 11 and June 5, 1976.

Observing the record Contract price increases in fall, 1975, were potato growers and merchandisers through the United States, including Idaho. There was no other national market for potatoes because the Chicago Mercantile Exchange's Idaho potato contract had been virtually destroyed by defendants Simplot, Taggares and (crony) Ramm in a spectacular manipulation in 1971. See *infra;* see also Report of the Subcommittee on Special Small Business Problems of the Permanent Select Committee on Small Business, April 1, 1974, at p. 44. Thus, the prices paid for newly harvested potatoes in the field during the early harvest in Idaho increased from $3.00 per cwt. to a $3.50-$4.00 range between August and mid-September, 1975.

Defendant J. R. Simplot was a net purchaser of at least 25,000,000 cwt. of potatoes per year. Accordingly, the $.25-$.50 per cwt. price increases recorded on the potato cash markets in Idaho could translate into annual increases of $6-$12,000,000 in Simplot's potato purchasing requirements costs. Defendant Taggares was also a large net purchaser of potatoes; approximately 10,000,000 cwt.

Simplot and his companies forward contracted (*i.e.*, committed themselves, even before the potatoes were planted, to purchase the yield from a specified number of a grower's acreage at a negotiated price) approximately only

50% of their fresh potato purchasing requirements, and acquired the other 50% via fresh market purchases at selected times during the year. Other potato processing businesses, not wishing to risk the vagaries of the cash market, forward contracted 80-90% of their potato purchasing requirements.

This difference in methods appeared in September, 1975 to have crucially backfired on Simplot because he had not anticipated the Contract price increases. Simplot's competitors, which had secured 80-90% of their potato processing requirements at prices negotiated during the February-March 1975 period (during which cash market prices had been lower and the Contract, the key indicator of prices in the future, had been trading at $5.94-$6.25 per cwt.) were thus at a distinct competitive advantage over Simplot, who had to purchase approximately 12,000,000-13,000,000 cwt. of potatoes in the face of $19.00 Contract prices during the next year. Because of the intensely price-competitive market for processed potatoes (with MacDonald's, Burger King, the U.S. Army and other large contracts turning on $.05-$.10 per cwt. differences on major contracts, including Bicentennial contracts to be negotiated that year), Simplot faced serious consequences if the Contract continued to trade at $13.00-$19.00 and, observing this, the growers in Idaho continued to demand higher prices as May, 1976 approached.

In 1973 Simplot consented to the entry of an order by the Commodity Exchange Authority ("CEA") enjoining him and his corporate vehicles from, and directing him and them to cease and desist, manipulating or attempting to manipulate commodities in interstate commerce. Ditto defendants Taggares and Ramm, who manipulated the long side of the same contract of which Simplot—again in a year of great shortages of potatoes—was manipulating the short side.

Such order was entered in connection with another May potato futures contract, this one in 1971 on the Chicago Mercantile Exchange, in which Simplot and his corporations had: (a) taken a massive 700-car short position; (b) repeatedly used "roller cars", that is railroad cars of potatoes which were shipped without having been pre-sold and which roll from point to point in search of a buyer so that they assert a depressant effect on both the terminal markets they pound with potatoes and the shipping points they demoralize with reports (thus creating the perception) that no buyers are available; (c) not liquidated such 700-car short position and had failed to deliver thereon and claimed in excuse therefor that there was a railcar shortage and emergency; and (d) persuaded the contract market to declare a cash settlement instead of a default, purportedly because there was a non-delivery situation excusable because of the claimed railroad car shortage declared by the Governor of Idaho to be an emergency. As noted above, that manipulation and the adverse publicity that followed virtually destroyed the Chicago Mercantile Exchange's potato contract.

Short Selling, Conspiracy, Roller Cars and Defiance from IPGA

Confronted by skyrocketing Contract prices and Idaho growers who, citing the $19.00 Contract prices, demanded more money for their potatoes, Simplot realized it would be a very long, expensive and potentially disastrous business year if the high Contract prices continued. Remembering the slap on the wrist from 1971, Simplot, on or about September 12, 1975, resorted to his old tactics, beginning to sell Contracts, this time through petitioner Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson").

By March, 1976, Simplot had accumulated extraordinarily and unlawfully large short positions in the Contract. Despite his heavy selling, however, the increasingly bullish

fundamentals for the Contract (accelerating export demand and disappearing supplies) had again driven prices up, this time to above $14.00 per cwt. and knowledgeable trade people were talking about $40.00 per cwt. prices by the time potato supplies ran out in May (or earlier). Buoyed by such talk, the Idaho Potato Growers Association ("IPGA"), with which Simplot did virtually all his forward contracting, had refused *for the first time in history* to meet the terms dictated by Simplot.

Thus, Simplot met with defendant Taggares in March, 1976. Taggares was then a net long in the Contract. To avoid another stand-off and promote their mutual self-interest of manipulating cash prices as low as possible, they entered into an agreement to sell short, drive Contract prices down, and destroy the Contract, if possible. To formalize this agreement they chose to use their joint-venture partnership, Simtag Farms (another defendant below avoiding this appeal process), as a trading vehicle. Further, and contrary to their own economic interest to sell potatoes for the best price, they bombarded eastern cash potato markets with roller cars, so as to panic western potato farmers and depress eastern potato prices.

In order to have the best friend possible at the Exchange for the problems following their default, it had been recommended to Simplot and Taggares that they open their account with the Vice Chairman of the Board of Governors of the Exchange, Benjamin Pressner.[3] Before Pressner would allow Simtag to open an account, let alone place a single trade, he demanded $1,000,000 in margin. Simplot paid $1,000,000 by his check to Simtag which, under Taggares' signature, paid the $1,000,000 to Pressner.

3. Benjamin Pressner was not only the Vice Chairman of the Exchange during these critical events but was, dually, head of Pressner Trading Corp. ("Pressner"), the fourth principal futures commission merchant in the Contract, see discussion *supra*, n.1. The Pressners, though defendants below, similarly chose to avoid this appeal process.

Thereafter, Taggares began to trade short through his, his corporations', his children's, his employees' and his debtors' accounts; Simplot similarly continued doing likewise through his, his corporations', his friends' and his wife's accounts; conspirator-defendant Ramm switched from the long side and began selling short through his accounts; and Simplot and Taggares caused their partnership, Simtag, to take extremely large short positions (totalling 25 million pounds of potatoes).

The petitioner future commission merchants here permitted defendants Simplot and Taggares to acquire and maintain unlawfully large positions in violation of CFTC speculative limits, and petitioners Heinold and Thomson violated or ignored numerous of their internal rules to accommodate these large customers.

By April 28, 1976, the CFTC had finally determined that emergency intervention into Contract trading was necessary for a number of reasons, including the presence of Simplot, Taggares, Ramm, their histories of manipulating, their extremely large, concentrated short position and the very low supplies. However, rather than acting, the CFTC met with the Exchange officials on April 28 and April 30, 1976 (the week before the May 7 end of trading).

Of course, the Exchange officials wanted Contract trading to continue because the final days of trading were very profitable for the Exchange (see n.1, *supra*). Equally important, however, the Exchange was conspicuously represented at both these meetings, not by the Chairman of its Board of Governors, Jacob Stern, but rather by Simplot's agent, Vice Chairman Benjamin Pressner. To allow Simplot more time to drive down Contract prices and force IPGA into submission, Pressner, *inter alia*, pooh-poohed suggestions by the Exchange President that Simplot was out to destroy the Contract. Pressner persuaded the CFTC not to intervene in Contract trading, suggested they take the pitiful gesture of sending warning telegrams, and even

vouched for Simplot as a man of his word (JA 49, 97-98, 101). Pressner and the individual petitioners here concealed these meetings with the CFTC from others members of the Exchange Board of Governors, until after the default.

Thereafter, despite the CFTC's warning telegrams and follow-up warning telephone calls about liquidating the positions during the last week of trading, Simplot and Taggares not only refused to liquidate, but sold many more Contracts.

On May 7, the final trading day, Simplot and Taggares ELIMINATED all competition on their side of the market by CONSOLIDATING their orders and accounts from their different brokerage houses, including those carried at petitioners Heinold, Thomson and Clayton, in the hands of Vice Chairman Pressner's floor broker on the last day. The petitioners were required by Exchange Rule 44.02 to liquidate Simplot's and Taggares' positions to ensure that they had delivered stocks on hand. Rather than observe Exchange Rule 44.02, and despite the fact that they knew their customers lacked deliverable supplies, petitioners capitulated to their large customers and permitted them to determine for themselves whether they would liquidate (and at what price) or default.

This enabled Vice Chairman Pressner's floor broker in the pit on the final day to control and withhold the liquidation side of one-half of the market. Of course, not only did Simplot and Taggares *not* liquidate, but they and their co-defendants pounded Contract prices down by selling many more Contracts on May 7. As a result, despite the record bullish fundamentals, prices plummeted on May 7 from $10.70 per cwt. to $8.10 per cwt. But there was a near-record open interest (in a year of record shortage) after trading ended and thus Simplot, Taggares, Ramm and their cronies, owning 99% of the 1911 Contracts, were obligated to deliver almost 100,000,000 pounds of Maine potatoes.

Thereafter, the petitioner futures commission merchants were required by Exchange Rule 44.02 to purchase Maine potatoes to deliver on their customers' accounts. Instead of performing, however, two petitioner-brokers simply obtained indemnification agreements from Simplot for all damages resulting from their violation of their obligation in this respect. The Exchange similarly failed and refused to enforce its rules, including Exchange Rule 51.14, to the effect that the president would purchase potatoes to cover any defaulted position.

As the 1975 crop perished, potato prices plummeted. The May Maine potato contract has since been discontinued, and IPGA has never refused to come to terms with Simplot again (its Secretary, who reported the roller cars to the CFTC in 1976, has since been fired).

Long Conspiracy

Toward the end of April 1976, as is so often the case in commodity futures (see n.1, *supra*), a second conspiracy allegedly began to evolve. Various defendants below and others, having learned of the conspiracy of the shorts, determined to conspire and "squeeze" those shorts. The squeeze would be accomplished by purchasing as many contracts as possible and then tying up the cash potato market so that the shorts could not make delivery. As a result of the scarcity of potatoes available for delivery by the shorts (Simplot and Taggares) against the Contract, these long counter-conspirators necessarily obtained more long positions than could be delivered on.

Damages

Together, these manipulations destroyed a competitive market altogether and caused substantial damages. Respondents held long positions in March when Simplot and Taggares formed their conspiracy; Simplot accelerated his short selling, Taggares switched to short selling, and both

men bombarded the cash markets with roller cars and commenced more short selling through their joint-venture partnership. Simplot, Taggares and their conspirators then not only BROKE the bullish trend but actually DROVE DOWN Contract prices from in excess of $14.00 to $8.00-$9.00 per cwt. range. (A $6.00 per cwt. plummet in prices on only 50 Contracts translates into $150,000—500 cwt. x $6.00 per cwt. x 50.)

Further, respondent Incomco was forced to take delivery on 35 March 1976 Maine potato futures contracts because it believed that the potatoes which its March contracts represented were worth far more than the March contract trading prices reflected (because of price arbitrage, when Simplot and Taggares manipulated the Contract price downward they had to manipulate downward *all the other* Maine potato futures contracts as well). Respondent Incomco thereafter stored such potatoes in Maine in anticipation of selling same in May for delivery on the Contract. When the default of Simplot, Taggares and their conspirators became obvious after May 7 but well before the Contract delivery period had expired, Incomco was unable to make proper delivery under the Contract because the long conspirators had succeeded in tying up virtually all railroad cars in Maine (Contract delivery was required to be made by rail cars).

Incomco and its agent orally and in writing made numerous demands upon the Exchange to permit extension of the delivery period and/or for permission to deliver potatoes by truck rather than rail cars. It was, or should have been, obvious to the Exchange, in view of the large open short positions, that there was a ready, willing market for these potatoes and that such extension or permission would ameliorate the defaults. Moreover, it also was, or should have been, apparent to the Exchange that measures necessary to permit delivery and avoid default should have been taken. However, the Exchange not only ignored these demands but,

as noted, in violation of its own Rule 51.14, it *refused* to purchase any potatoes to cover the defaults of Simplot, Taggares, *et al.*

Since potatoes were then perishing, Incomco's potatoes eventually could not meet the United States Department of Agriculture standards and, thus, were unsalable—they rotted.

Respondent Leist had warned petitioner Levine of a threatened manipulation in March, 1976. In fact, though no action was taken by the Exchange, a defendant below threatened Mr. Leist's life if he interfered with the manipulation, which threat Mr. Leist promptly reported to the CFTC (and, after being threatened again, to the U. S. Attorney's office). The CFTC or its predecessor Commodity Exchange Authority staff had previously received reports that, and investigated whether, such defendant was financed by organized crime figures Meyer Lansky and Samuel Cohen.

It was, *inter alia,* Mr. Leist's report which prompted CFTC officials to meet with the Exchange on April 28 and 30, 1976 (actually with Simplot's agent, Vice Chairman Pressner; Exchange Board of Governors Chairman Jacob Stern, a veteran potato contract manipulator since at least 1955, accommodatingly left for Florida to allow the defendant Vice Chairman an opportunity to persuade CFTC officials that neither the Exchange nor the CFTC should act to stop Simplot's and Taggares' destruction of the Contract).

In concluding our statement of the case, we must describe the relationship of the fact situation here to the rest of society. *Llewellyn, supra,* n.1 Since the 1974 amendments to the CEA, the commodity futures business has EXPLODED, tripling from a .5 to a 1.5 trillion dollar business. These markets are extremely important, impacting almost immediately on consumers and producers of farm

products, financial instruments, precious metals, etc. However, merely stating that the commodity futures markets are extremely important does not complete our task.

The legal mind normally approaches problems through legal terminology and assumptions: *e.g.*, this collection of individuals is a "contract market" or a "commodity exchange", and perhaps entitled to some presumption of regularity; that collection of individuals is a "futures commission merchant", these people are "floor brokers", and those people are "non-registrants"—encompassing anyone from the average investor trying to hedge against inflation through interest rate, gold or silver futures contracts, to the *large* manipulators.

We must attempt to pierce through this potential morass of legal terminology and assumptions, and emphasize that, despite the uniqueness of the default, the EGREGIOUS unlawfulness here actually TYPIFIES the "bad lands of the commodity futures markets". *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 435 (N.D. Cal. 1968). "From the beginning, the inherent speculativeness of commodity trading and the absence of government regulation spawned a breeding ground for unscrupulous tactics, manipulation, and irresponsible trading." *Precious Metals Associates* v. *CFTC*, 620 F.2d 900, 905 (1st Cir. 1980). Be they exchange insiders or brokerage house salesmen and officials, commodity futures personnel all too often behave and array according to allegiance to concentrations of money and considerations of self-interest—such that, when cast in stark relief as at bar, they break down not as "futures commission merchants" etc. but rather as "longs" and "shorts", with both sides attempting to use their positions and money to influence events, policy and prices.

Worse, consent decrees, injunctions or suspensions often provide a notoriety, even a perverse sort of credibility or mystique to the exchange insider, regardless of whether he

operates on the biggest[4] or the smallest[5] exchange. Of course, the suspensions, fines, etc. may be merely a cost of doing business to the large manipulator—aside from substantial trading profits, Simplot and Taggares profited spectacularly from both the short and long run beneficial effects on *their* cash market potato business of the manipulation (which effects included the eventual discontinuance[6] of the May contract).

Thus, with the advent of the CFTC in 1975, many thought that manipulation of commodity futures contracts would become a social anachronism, a vistigial excess of the complete freedom those markets had theretofore operated in and abused. That at any rate has been the objective of Congress' commodity regulation for fifty years. See *infra*.

In fact, more nearly the opposite has occurred. The CFTC has marginally afforded commodity futures markets what they have always coveted, an aura of respectability and trustworthiness.

Combined with a variety of other factors, it has thereby provided them with more victims to be plucked, and the incidence of major market disturbances had steadily increased until the Second Circuit's decision last July: 1976, potatoes and frozen pork bellies; 1977, coffee and soybeans;

4. See "Despite His 'Image' [allegations of fraud in commodity options and a squeeze on the wheat futures] Rosenthal Seems Sure to Head The Chicago Board of Trade", *supra*, at n.1.

5. Petitioner Stern attained his Chairmanship of the Exchange Board of Governors only AFTER consenting to a Commodity Exchange Authority decree ordering him to cease and desist manipulating Maine potato futures contracts.

6. Some may argue that Simplot, Taggares and Ramm are losing their power inasmuch as it took three years for the May Maine contract to disappear, whereas the Idaho May contract ceased to be a force immediately after the 1971 debacle. But the rejoinder to these nay-sayers is that the May contract was TOTALLY discontinued whereas the Idaho contract is still lingering.

1978, orange juice and silver; 1979-1980, potatoes, wheat, sugar, cotton, copper and silver.

The CFTC has been greatly criticized for mistakenly deferring to exchanges and for many other problems (*e.g.*, the "most screwed-up agency", Senator Thomas Eagleton). It almost did not survive its "sunset" or reauthorization hearing in 1978. Today, the CFTC continues to rely upon these exchanges, and upon private attorneys-general (whom it calls "necessary" or helpful) to deter the wrongdoing. *E.g.*, *Amicus* brief filed in *Leist* v. *Simplot*, below.

But the exchange insiders have been *un*willing to provide this deterrence. And the private attorneys-general have been unable. As perhaps in all new areas of regulatory law, there has been a tug-of-war played out in the courts here: on one side, the well-heeled, highly organized, self-interested concentrations of money most affected by the regulation and court rulings (brokerage houses, large traders and exchanges); on the other side, fortuitous, disorganized victims, adventitiously harmed but determined to obtain justice. The early losses of these plaintiffs (coupled with the CFTC's infamous bumbling) initially eviscerated and *reduced* deterrence, rendering commodity futures fairly safe for manipulators.

We firmly believe, for example, that the gargantuan, infamous Hunt silver conspiracy accelerated when it did, in early July 1979, because of judicial decisions: (1) the decisions denying certification and antitrust jurisdiction in 1978 (*C&S Associates* v. *Anderson, Clayton & Co.*, 1978-1 Trade Case (CCH) ¶61,985 (S.D.N.Y. 1978), and *Smith* v. *Groover, supra*); (2) the CFTC's inability to sanction the Hunts meaningfully in soybeans, in early 1979 (*CFTC* v. *Hunts*, 591 F.2d 611 (7th Cir. Jan. 1979) *petition for rehearing denied* March 23, 1979); (3) Judge McMahon's denial of the private right of action in mid-1979 (*National Superspuds* v. *New York Mercantile Exchange*, 470 F. Supp. 1256, 1263 (S.D.N.Y. May 29, 1979)); and (4) Judge

Decker's refusal to imply a private right of action against, or permit Clayton Act jurisdiction over, the Hunts (*Liang* v. *Hunt et al.*, 477 F. Supp. 891 (N.D. Ill. July 29, 1979)—the "green light" decision rendered just three days before the Hunts and Arab Sheiks formed the joint venture which drove silver prices through the roof).

Leist v. *Simplot* halted this trend. Now it is up to this Court to reverse the trend, and to reverse it by recognizing that the only true deterrent to large manipulators, the only disagreeable, unglamorous penalty which forces exchange and brokerage house personnel to staff and listen to their compliance departments, is the certitude of large damage suits from every investor harmed by their enlistment in, or feigned ignorance of, the manipulation.

Summary of Argument

During the last fourteen years, more than 45 courts have upheld or accepted (see n.7 and n.9, *infra*), and during the last four years the CFTC has advocated, implied private actions under the CEA.

The excellent, scholarly opinion of the Second Circuit Court of Appeals (Friendly, J.) correctly apprehends (nay, anticipates) the relevant law. *Compare* (JA 158) (Congressional intent is the "ultimate touchstone" of the implication analysis), *with California* v. *Sierra Club*, —— U.S. —— Slip Op. at p. 5 (April 28, 1981) ("ultimate issue" is Congressional intent); *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, —— U.S. ——, 101 S. Ct. 1571, 1580 (April 20, 1981) ("ultimate question . . . is whether Congress intended to create the private remedy"); *Riegel Textile Corp.* v. *Celanese Corp.*, No. 80-7697 (2d Cir., May 6, 1981) (J. Kearse of the panel below, joining a panel applying recent implication decisions to deny an action).

In order to strengthen deterrence against the very evils at bar, Congress enacted "remedial legislation" in the "contemporary legal context" of 1973-74, which constituted "the first complete overhaul of the Commodity Exchange Act since its inception" and a "comprehensive rewrite of futures trading regulation". *Cannon* v. *University of Chicago*, 441 U.S. 667, 698-699 (1979); H.R. Rep. No. 93-975 at 1; H.R. Rep. No. 93-975, 93d Cong. 2d Sess. 39 (1974).

As the court below correctly perceived, there are FIVE crucial distinctions between the *sui generis* circumstances of the CFTCA, and those present in this Court's recent implication decisions:

(1) here, Congress was considering NOT a blank slate but rather a pre-existing statute under which implied private actions had been UNIVERSALLY and UNANIMOUSLY recognized, see Point I, pp. 20-21 *infra;*

(2) in the increasingly liberal federal jurisprudence prevalent at the time of the relevant legislative action, 1973-74, Congress did not, by today's standards, know how to apply a private remedy if it wished to, see Point II, pp. 21-25 *infra;*

(3) the legislative history TEEMS with evidence that Congress CONTINUED the implied private remedies, see Point III, pp. 25-34 *infra;*

(4) the private remedies here were (i) created after well-recognized implied private actions existed (Point IV, pp. 34-39 *infra*), (ii) expressly and carefully described as NOT intended to "interfere with the courts in *any* way" [emphasis supplied] (pp. 31-32 *infra*), and (iii) *predicated* on the availability of the implied private action (see pp. 29-31 *infra*); and

(5) the unparalleled incidence of swindling endemic to the "badlands" of the commodity futures markets,

especially the evils at bar, can best be deterred by private actions for damages. See Statement of Case *supra*.

Petitioners' arguments regarding Prongs I, III and IV of the *Cort* v. *Ash*, 422 U.S. 66 (1975), analysis and many of their subsidiary arguments regarding Point II are INSUBSTANTIAL, and, rather than burden this brief with repetitious material, we implore the Court to consult the opinion below, especially JA 129-137 and JA 169-170.

In these compelling circumstances, the Second Circuit correctly apprehended and (via an Act, rather than a section analysis (JA 159-164)) applied this Court's recent decisions to uphold the implied private action by (i) *per force* operation of the re-enactment canon of statutory interpretation, *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) and (ii) a finding that petitioners here could not rebut the presumption that Congress approved the prior judicial decisions (JA 143-146).

POINT I

Private actions were universally and unanimously recognized before the relevant legislative action.

When Congress enacted the CFTCA in the "contemporary legal context", *Cannon* v. *University of Chicago*, 441 U.S. 667, 698-699 (1979), of 1973-74, fully FOURTEEN courts had UNANIMOUSLY (with nary even a dissenting judge or justice—except to the extent that Justice Stewart would have allowed the CEA claim to proceed DIRECTLY to trial in *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 114 (1973)) recognized the implied private action under the Act.[7]

7. *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor, supra; Booth* v. *Peavey Company Commodity Services*, 430

(footnote continued on next page)

In fact, in the leading case, *Deaktor, supra*, at 534 (which was cited numerous times to the House and Senate, *e.g.*, JA 140), the Seventh Circuit Court of Appeals emphasized that the courts had then "apparently uniformly concluded that such an [implied] action exists." *Accord, Case & Co., Inc.* v. *Board of Trade of the City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975) (when Congress enacted the CFTCA it was "undisputed that a private cause of action may be maintained under the Commodity Exchange Act").

Indeed, Congress apparently was apprised that these reported cases were but the tip of the iceberg (JA 120 n.16, 142).

Thus, prior to 1974, the Supreme Court and all other courts "had consistently found implied remedies . . . . It was *after* [Congress initiated consideration of the 1974 amendments] that this Court decided *Cort* v. *Ash* [(1975)] and the other cases cited in support of . . . strict construction of the *remedial* aspect of the statute . . . . In sum, it is not only appropriate but realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." [emphasis supplied] *Cannon*, 441 U.S. 667, 673.

F.2d 132 (8th Cir. 1970); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076 (S.D.N.Y. 1974), *aff'd sub nom. Miller* v. *New York Produce Exchange*, 550 F.2d 762 (2nd Cir.), *cert. denied*, 434 U.S. 823 (1977); *Arnold* v. *Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Epsey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972), *aff'd per curiam*, 477 F.2d 113 (5th Cir. 1973); *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970); *Anderson* v. *Francis I. du Pont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

POINT II

In the increasingly liberal federal jurisprudence prevalent at the time of the legislative action, Congress did not, by today's standards, know how to imply a private remedy if it wished to.

Moreover, this UNANIMITY and UNIVERSALITY were only part of the contemporary legal context".

First, 1973-74 was the HIGH TIDE of judicial activism in implying private actions under the closest factual and legal analog at bar, federal regulation of the securities industry. *E.g., J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *Superintendent of Insurance of the State of New York* v. *Bankers Life & Casualty Co.,* 404 U.S. 6 (1971); *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972). Indeed, at the time Congress considered the CFTCA, lower courts had been liberally implying private actions for thirty years, and the Supreme Court had apparently never rejected an implied private action under the securities laws. Pitt, *Standing To Sue Under The Williams Act After Chris-Craft,* 34 Bus. Law 117, 121 (1978) (JA 113-118, 141).

Second, 1973-74 constituted a trend of accelerating liberalism in the nation and courts at large, including (i) serious conjecture about the demise of the Republican Party, (ii) an impending liberal and Democratic Party landslide in the 1974 Congressional elections, and (iii) loss of public faith in governmental institutions except for federal courts which (unlike now) were the contemporary heroes. Activist, even *interventionist,* court holdings typified an increasingly liberal jurisprudence in cases involving busing, prisons, and moral questions, as well as implying private actions.

Thus, unlike Congress today—which has had ample warning to provide more court resources, and to be explicit

where creation of court remedies is desired[8]—in 1973-74 Congress had no inkling of a more conservative jurisprudence and so simply did not, by today's standards, know how to imply an action if it wished.

Suggestions that *National Railroad Passenger Corp.* v. *National Railroad Passenger Association*, 414 U.S. 453 (1974) ("Amtrak") could have accomplished the herculean task of signalling a stricter implication analysis—despite the stormy seas of liberalism which were engulfing the country—are clearly incorrect, even with the benefit of 20/20 hindsight. In addition to the persuasive reasons below against this (JA 157-58), an analysis on a going-forward basis in 1974 of *Amtrak* would have had to consider the following:

(1) *Amtrak* did not involve a remedial statute, or one designed to strengthen deterrence;

(2) *Amtrak* involved instead a regulatory statute in an industry that had been regulated for one hundred years (and whose train conductors did not swindle people); and

(3) these factors were important because the United States Supreme Court, in *SEC* v. *C.N. Joiner Leasing Corporation*, 320 U.S. 344 (1943), did

8. Query: Would the 1981-82 Congress merely express in the legislative record an intent that private actions be implied under proposed legislation, if it knew that the Supreme Court would in 1989 take the drastic step (within today's "contemporary legal context") of declaring implied private actions to be *per se* unconstitutional? While perhaps in view of today's trend toward increasingly conservative federal jurisprudence, some prescient Congressional staffer might have an inkling of that possibility, the trend in 1973-74 was toward increasing liberalism with no such inkling or clues of a more conservative trend (and, thus, of today's stricter standards) to come.

not apply the *expressio unius* doctrine in the instance of the federal securities laws.[9]

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9. Moreover, as a practical matter *Amtrak's* signaling of a more conservative trend, even with the aid of *bona fide* conservative cases from this Court in 1975-1978, did not prevent the courts from continuing to imply private actions.

Ames v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174 (2d Cir. 1977); *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977); *Case & Company, Inc.* v. *Board of Trade of City of Chicago*, 523 F.2d 355 (7th Cir. 1975); *Auditore* v. *Rosenthal & Co.*, CCH Comm. Fut. L. Rep. ¶ 20,658 (N.D. Ga., May 26, 1978); *Bache Halsey Stuart, Inc.* v. *French*, 425 F. Supp. 1231 (D.D.C. 1977); *Kelley* v. *Carr*, 442 F. Supp. 346 (W.D. Wis. 1977); *Romnes* v. *Bache & Co.*, 439 F. Supp. 833 (W.D. Wis. 1977); *E. F. Hutton & Company, Inc.* v. *Lewis*, 410 F. Supp. 416 (E.D. Mich. 1976); *Milani* v. *ContiCommodity Services, Inc.*, 462 F. Supp. 405 (N.D. Cal. 1976); *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976); *Bartley* v. *P. G. Commodities Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,123 [1975-1977 Transfer Binder] (S.D.N.Y., December 23, 1975).

Incidentally, since then, many more courts have upheld the private action.

Witzel v. *Chartered Systems Corp. of New York, Ltd.*, 490 F. Supp. 343 (D.C. Minn. 1980); *Estep* v. *Paine Webber Jackson & Curtis*, —— F. Supp. ——, No. 80-0833-C(5) (E.D. Mo., Feb. 3, 1981); *Dart Partnership* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Civ. No. H-80-1205, CCH Comm. Fut. L. Rep. ¶ 21,129 (D. Md. 1980); *First Wall Street Settlement Corp.* v. *Nagib*, No. 80 C 0061 (N.D. Ill. July 25, 1980) (*First Wall* is particularly interesting in that it was decided by Judge Marvin Aspen, sandwiched in between his DENIALS of the implied private actions under Sections 11(d) and 13(d) of the Securities and Exchange Act in *Sennett* v. *Oppenheimer & Company, Inc., et al.*, No. 78 C 1418, CCH Fed. Sec. L. Rptr. ¶ 97,834 (N.D. Ill. 1980) and *Gateway Industries, Inc.* v. *Agency Rent-A-Car*, 495 F. Supp. 92 (N.D. Ill. 1980)); *Bache* v. *Friedman, supra* n.1; *Pollock, supra*, n.1.

Chipser v. *Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979); *Master Commodities, Inc.* v. *Texas Cattle Management Co.*, 586 F.2d 1352 (10th Cir. 1978); *First Wall Street Settlement Corp.* v. *Hartley*, CCH Comm. Fut. L. Rep. ¶ 20,899 (C.D. Cal., February 23, 1979); *R. J. Hereley & Son Company* v. *Stotler & Company*, 466 F. Supp. 345 (N.D. Ill. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F. Supp. 213 (D. Kans. 1979); *Palmer Trading Co.* v. *Shearson Hayden Stone, Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,900 (N.D. Ill., April 20, 1979); *Parker* v. *Rosenthal & Co.*, Civil Action No. 76-M-1224 (D. Colo., November 23, 1979); *Poplar Grove Planting and Refining Co.*

(footnote continued on next page)

Further, why did counsel for petitioners—though sued in 1976, and totally contrary to accepted litigation strategy —wait to move against the complaint until AFTER class certification had been heard and decided under Rule 23 of the Federal Rules of Civil Procedure ("F.R.C.P."), AFTER extensive discovery had been taken and completed, and AFTER pretrial submissions? Indeed, if winds of change were blowing, then why did counsel for petitioner Heinold actually sue and take extensive discovery EXCLUSIVELY on the basis of a CEA claim between 1976 and 1978?

Therefore, Congress simply did not, by today's standards, know how to imply a private action in 1973-74. But Congress did know how to imply and, in fact, did imply a private action by the standards then prevailing. *E.g., J. I. Case Co.* v. *Borak, supra.*

POINT III

The legislative history of the Commodity Exchange Act teems with evidence that Congress continued the implied private remedy.

In this "contemporary legal context", Congress undertook remedial legislation designed to deter the very evils at bar. As surely as yellowed papers exhumed from a time capsule, the legislative history of this undertaking constitutes the legacy of another era—as demonstrated above, a far more liberal era in which a court's refusal to imply private remedies under such legislation would have been UNTHINKABLE.

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v. *Bache Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *Berenson* v. *Madda Trading Company*, CCH Comm. Fut. L. Rep. ¶ 20,689 (D. D.C., Oct. 30, 1978); *Gravois* v. *Fairchild, Arabatzis*, Comm. Fut. L. Rep. (CCH) ¶ 20,706 (E.D. La., Nov. 9, 1978); *Hofmayer* v. *Dean Witter & Co., Inc.*, 459 F. Supp. 733 (N.D. Cal. 1978).

Obviously, in analyzing materials from a time capsule, we must be careful not to superimpose our understandings upon what we encounter; we must strive to ascertain the meaning of what was intended by remembering the "contemporary legal context" in which the materials were generated.

1. December 13, 1973

First, the Chairman of the Agriculture Committee of the House of Representatives, Representative Poage, on the very day that he INTRODUCED the bill that eventually became the CFTCA, emphasized to the *entire* House of Representatives that "courts [have] implied a private remedy for individual litigants under the Commodity Exchange Act". 119 Cong. Rec. 41,333 (Dec. 13, 1973). This was *not* a random legislator educating his fellow House members about a random topic. Rather, here was the most powerful and most informed person on the relevant committee beginning an explanation—all of which was included in the House Report (JA 139-40)—of the necessity for the MAJOR change made in commodity futures regulation by the proposed bill.

Chairman Poage continued to explain that "the judgment [or feigned lack thereof, he might have added (see n.1 *supra*)] of the board of directors of many of the exchanges in implementing decisions under self-regulatory functions is becoming increasingly a justiciable issue". (*Id.*) The consequences of this, Chairman Poage asserted to the entire House, was that the exchanges had been adopting fewer rules and doing less regulating, a very troubling and significant major failure which required a major change (JA 134-41).

What was the major change advocated by Chairman Poage? A repeal of the implied private action in order to induce exchanges to adopt more rules? No, not in 1973-74; as would be expected, NOT ONE REPRESENTATIVE in

the entire House expressed displeasure with the implication of private actions then (nor did *any* legislator in *either* House express such displeasure at ANY time during the entire 1973-4 process). (JA 139-41, 157-58) Precisely the contrary, Representative Poage argued that a new agency (which ultimately became the CFTC) should be created with authority to COMPEL the exchanges to adopt or amend such rules. (JA 140-42)

No member of Congress could have cast an informed vote regarding this drastic change without understanding Chairman Poage's lecture about the EXTREMELY IMPORTANT implied private action.[10] (We submit, however, that it would then have been an even MORE DRASTIC change to eliminate the implied private action.) Moreover, the change proposed—which was ultimately adopted as § 8a(7)—implicitly relied on the continuance of the implied private action as the whip which insures that exchange insiders enforced such rules as the CFTC compelled them to adopt.

2. House Hearings

Second, the House Agriculture Committee hearings in 1973-74 are CHOCK-FULL of discussions supporting the availability of an implied private action and nary a word disputing it. *See, e.g., Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the Committee on Agriculture, House of Representatives*, 93d Cong., 1st Sess. (1973) 119 (statement of Clark Reed *et al.* representing commodity exchanges and brokers, that disputes "can be reviewed by the courts"), 198 (statement of Leo Melamed, secretary of the board, Chicago Mercantile

10. It must be remembered that Chairman Poage and other members of Congress simply did not know that they would later be required to express an intent to "create private remedies at law". Realizing this, and that statutes are typically "silent or ambiguous" (*Cannon, supra*, 697) where no express action is created, it is truly remarkable how favorable the Chairman's treatment was.

Exchange, on availability of "recourse to the courts"); *Commodity Futures Trading Commission Act of 1974; Hearings Before the Committee on Agriculture, House of Representatives,* 93d Cong., 2d Sess. (1974) 249 (statement of Charles W. Chapin, New York Coffee and Sugar Exchange, that "complainants of course have access to the courts"), 321 (statement of Sheldon L. Berens, Continental Grain Company, that courts "have already held that they have jurisdiction over private complaints based on violations of the present law").

Obviously, therefore, the House bill (H.R. 13113) continued the implied private action.

3. Senate Hearings May 13; Senator Clark and the House Error

Confirming this, on the OPENING day of the Senate hearings, Senator Clark from Iowa lamented the House bill's absence of a *treble* damages provision (three Senate bills and numerous Senators favored a treble damages provision) as well as certain excesses in the bill's exclusive jurisdiction provision, as follows:

> "Unfortunately, the House bill not only does not authorize them, but section 201 of that bill may prohibit all court actions. [The treble damages action was in favor of private individuals; obviously all court actions here refers exclusively or in part to private actions by individuals, all of which actions had theretofore implied ones.] The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate." Senate Hearings at 205.

The "*staff* of the House Agriculture Committee; . . . *hope*[*s*] it can be *corrected* in the Senate" [emphasis supplied]—besides revealing that both Senator Clark and the relevant House Committee UNDERSTOOD the implied

private action and WANTED it to continue, this statement sets the plot tension for the Senate Hearings: would the Senate act to correct the excesses in the exclusive jurisdiction provision and, thereby, preserve court actions?

4. May 14; Donahoo and Rodino: The Establishment of an Upper Limit on Exchange Arbitrations Was Premised on the Existence of Implied Federal Actions to Handle Large Claims.

On the very next day of the Senate hearings (see p. 371), the Senators were again reminded of the implied private suit (Hearings, p. 385) by the Executive President of the Minneapolis Grain Exchange, one Mr. Donahoo. He faulted the arbitration procedures proposed to be required of commodity exchanges, for not establishing an upper dollar limit:

> "Some of the proposed legislation would require each contract market to provide a fair and equitable procedure for the settlement of customers' claims and grievances against a member or a member's employee. We believe many of the provisions are unsound for several reasons. For example, there is no dollar limit on the size of claims that the contract market must offer to adjudicate. It would be unwise to allow large claims to be decided in this way. *On the other hand, a market-sponsored claim procedure for more modest claims is desirable because of the economic impediment to Court litigation that exists in such cases.* We therefore suggest a ceiling of $5,000 to $10,000 be placed on the claims to be decided by an exchange." [emphasis supplied] Senate Hearings, p. 415.

Spurred by this testimony, Senator George McGovern submitted "several questions" to Mr. Donahoo and—in a portion of Mr. Donahoo's responses selected for inclusion in the record (other portions of such responses were appar-

ently not so selected)—the latter responded by letter (see p. 401), in relevant part, as follows:

> "*Question 8* [from Senator McGovern]. Why limit customer claims to $5,000 or $10,000 [see Mr. Donahoo's proposed limit in testimony quoted above] if the exchanges and markets are working legally, efficiently and equitably [*i.e.*, the ever-vigilant liberals apparently meant that if there's nothing illegal going on and if you can process these matters efficiently and fairly, then why do we need a limit]?
>
> *Answer.* We believe that if a customer has a claim in excess of $10,000, he should hire an attorney to make certain that all facts are presented. *We are advised by our counsel that facts in large claims can best be established through the discovery procedure envisioned in the Federal Rules of Civil Procedure in the Federal court. For these reasons, we believe that customer claims should be limited to $10,000, and claims in excess of that amount should be decided by the courts.*" [emphasis supplied] Senate Hearings, p. 403.

Obviously, the very premise of the exchanges' pleas for establishing the upper ceiling was the *availability* of implied federal suit (and such was corroborated by the numerous criticisms of the exchanges' response to customer complaints. *E.g.*, pp. 580-81). In equally obvious reliance on the availability of the implied private remedy, an upper ceiling limit of $15,000 was placed upon such arbitration. 7 U.S.C. § 7a(11)(ii).

Also, a statement submitted by the then increasingly popular Representative Peter Rodino echoed Senator Clark's concern, that the exclusive jurisdiction language could "oust even federal courts of their jurisdiction"; thus, Rep. Rodino urged the Senators "to define the jurisdiction, including antitrust jurisdiction of federal courts for commodity transactions". Senate Hearings, pp. 257-62. Though Congressman Rodino's emphasized reasons for

avoiding this were federal antitrust and state laws, there is nothing to indicate that these were his exclusive reasons. Indeed, the language he proposed to correct this deficiency was *NOT* limited to preserving jurisdiction over only these matters and there is absolutely no reason for superimposing such a constricted reading on it (JA 153-54). Senate Hearings at 249-57.

5. May 16; Uhlmann and Lebeck

On May 16, 1974, the Senators were twice more reminded of the function of private actions.

Mr. Uhlmann of the Chicago Board of Trade reminded the Senators of the supplemental, voluntary and ALTERNATIVE, ELECTIVE nature of the Exchange arbitration procedure (7 U.S.C. § 7a (11)) in view of the implied private action:

> "Section 209 of H.R. 13113, as passed by the House, provides that a customer can voluntarily request arbitration but then does not require him to be bound by the arbitration proceedings. We feel that if a customer requests arbitration of his own will he should be bound by the results. If he is not, obviously he will take every adverse decision to the Commission or to the courts." Senate Hearings at 524.

Similarly, Mr. Lebeck drove the same point home:

> "MR. LEBECK. The Board of Trade established several years ago a review committee to which customer complaints could go and we have in addition an appeals committee above and beyond that and the customer, of course, still has access to the courts." Senate Hearings at 526.

6. May 21; Senator Talmadge

Repeated insinuations that what the House staff had called an "inadvertency" could actually extinguish private

actions apparently became too much for Committee Chairman Talmadge to take on the next to last day of the Hearings. Senator Talmadge rather snappishly told a witness the following:

> "THE CHAIRMAN. That's about what I was going to suggest. I have read your statement in its entirety, and I doubt that this committee, and I doubt the House had in mind depriving *either Federal courts of jurisdiction in antitrust matters, or any other matter, and certainly not State courts.*" [emphasis supplied] Senate Hearings, p. 664.

7. May 22; Professor Schotland

On the last day of the hearings, Professor Schotland (an administrative law expert), stated as follows:

> "The last question is this: if you do choose to retain [a reparations procedure, now CEA Section 14, 7 U.S.C. § 18] in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there."

8. Final Statements and Reports: Chairmen Talmadge and Poage

The time capsule shows that during the final statement before passage, Chairman Talmadge emphasized:

> "The vesting in the Commission of the authority to have administrative law judges and to apply a broad spectrum of civil and criminal penalties is likewise *not* intended to interfere with the courts *in any way.*" [emphasis supplied]

120 Cong. Rec. p. 30,459 (daily ed., September 9, 1974).

This phraseology is, we believe, fatal to the petitioners' arguments against the implied action here. In the 1973-74 era, the legislators did not know of the necessity to employ

the "private remedy at law" terminology. Unsurprisingly, in view of this and the recommendations by the witnesses, the praseology of the savings clause (see *infra*) is in terms of "jurisdiction". Of itself, this should be sufficient to encompass all implied rights of action. But see *Rivers* v. *Rosenthal,* 634 F.2d 774 (5th Cir. 1980). But when the leading, most powerful figure on this matter in Congress explains that the REPARATIONS proceeding and all other ADMINISTRATIVE powers in favor of the CFTC do not interfere with the courts "in any way", then we have conclusive sweeping legislative history preserving all causes of action as well. All the limits which our learned adversaries seek to impose on the scope of statements in the legislative history DISSOLVE in the face of Chairman Talmadge's sweeping explanation here.

Moreover, expressly in order to "*make clear* that . . . Federal and State courts *retain* their jurisdiction", the Senate and joint conferees inserted additional language into the statute by adding a savings clause proviso to the exclusive jurisdiction provision, as follows:

> "nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State." (CEA Section 2a) (JA 155).

Finally, lest there be any doubt, the respective chairmen of the House and Senate committees reported that

> "the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. *This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC.*" 120 Cong. Rec. 34997 (Oct. 10, 1974) (Representative Poage)." [emphasis supplied] (JA 156).

We believe this Court must recall what the word "remedial" signified in 1973-74, and remember that legislators

were not then aware of the necessity of saying "remedy at law". Recalling this, it is obvious that Congress inserted language to RETAIN federal court jurisdiction over implied private actions.

There is simply no logical or consistent way to read all these materials from the time capsule otherwise. The statements, the passage of §§ 5a(11)(ii) and 8a(7) (predicated as they were on the continuance of the implied private action), the passage of the savings clause to insure that the CFTCA would be "remedial legislation" and the explanation that reparations would "not interfere with the courts *in any way*"—in the "contemporary legal context" of 1973-74, these indicia constitute clear *evidence* that Congress intended to continue and obviously did continue the implied private action.

POINT IV

The reparations procedure was not intended to be exclusive.

Would Congress have immunized from private suit altogether the large manipulators or exchange insiders (see n.1 and p. 3, *supra*) and swindlers (*e.g.*, see Senate Hearings pp. 800-01, regarding the Goldstein, Samuelson scandal) who have plagued[11] futures trading? Would Congress

11. *E.g.*, 1974: "By assuring that the futures markets are not manipulated by a few large speculators, it will provide protection for the American Consumer." Joint Conferees Report, at p. 2. See Senate Hearings pp. 201, 474-479, 511.

1935: "The [1935] debates in Congress, like those in 1922 [see JA 130] . . . again . . . [were] . . . a recognition of the necessary role of speculators and *the focus of the attacks was on the big manipulator*, whose activity was perceived to be detrimental . . ." (emphasis supplied) (JA 132).

1968: "The legislative history of the 1968 amendments continued the *recognition* of the critical role played by speculative investors and *the attack on big or powerful manipulators* . . ." (emphasis supplied) (JA 133).

have rendered it IMPOSSIBLE to prove violations of the CEA against futures commission merchants based on concert of action or conspiracy (such as here) charges involving non-registrants and exempt exchanges (the reparations proceeding being very limited as to discovery)? Would a person sued on contract claims by their broker be unable to assert CEA violation counterclaims and instead have to commence a separate proceeding in reparations to litigate two separate cases? See *Paine Webber Jackson & Curtis* v. *Rosciewski*, CCH Comm. Fut. L. Rptr. [Current Transfer Binder] ¶ 21,175 (S.D. Cal., April 16, 1981).

Yet because the exchanges and the large non-registrant manipulators are not amenable to reparations jurisdiction this will be the ABSURD result should the theory that Congress' creation of reparations EXCLUDES private actions be carried to its ultimate. (JA 150-53)[12]

Confirming that Congress did not intend these absurd results, the language creating reparations does not purport to be "exclusive", "limiting" or in any respect exclusionary. Finally, the Second Circuit's excellent opinion below summarizes many other reasons why the reparation argument is wrong here. (JA 149-53)

12. Even more irrational than respondent Leist's inability to sue all necessary parties in the same forum if this interpretation were correct, is the situation of our client Friedman, in *Friedman* v. *Bache*, *supra* n.1 (an action for fraud, manipulation, and exchange failure to regulate during the Hunts' silver debacle). Congress could not have intended the following jurisdictional jumble in the instance of intimately intertwined defendants alleged to be in a conspiracy there: plaintiff would have to try to sue the non-registrants in federal court where he would have difficulty obtaining or could not obtain complete relief because of the absence of necessary defendants; meanwhile, he would have to sue the registrant for reparations before the CFTC and be unable to make out the claims there in the absence of necessary defendants; meanwhile, the futures commission merchant is suing him in state court; and, worst of all, plaintiff would *lack* the ability to assert any CEA violation counterclaims in the state court action which the futures commission merchant commenced in Florida, because those claims would supposedly be required to be brought in reparations. How can canons be applied to portray Congress as having intended this?

1978 Amendments Confirm This

After holding extensive hearings regarding the operation of the Commodity Futures Trading Commission, the Senate Subcommittee on Agricultural Research and General Legislation reported out a bill authored by Senator Huddleston addressing concerns raised in the hearings. Senate bill 2391. The legislative history of this bill shows that Congress again explicitly affirmed its endorsement of implied rights of action under the Commodity Exchange Act.

The Senate subcommittee seriously considered abolition of the reparations procedure altogether, "to get a lot of this out of your shop and into the courts which would leave you time for other activities," as Senator Huddleston stated to a Commission representative. 1978 Senate Hearings Part II at 79. However, the subcommittee was ultimately persuaded not to abolish reparations proceedings because, as Commissioner Dunn of the CFTC testified, "there should be a reparations procedure for the widows and the orphans. . . ." 1978 Senate Hearings, Part II at 79. Instead, Senate bill 2391 authorized Commission adjudication of claims of less than $5,000 without a full hearing "to expedite the resolution of disputes involving small claims." Senate Report 98-850, reprinted in 1978 U.S. Code Cong. & Admin. News 2117.

Senator Huddleston's bill was considered and passed by the Senate on July 12, 1978, at which time he provided a full explanation of the bill which leaves no doubt as to the intent of Congress:

> "In 1974, Congress directed the Commission to establish a reparation procedure for adjudicating customer complaints against commodity professionals and firms inexpensively and quickly. During the past 3 years, an unexpected number of reparation cases have been filed with the Commission, resulting in a substantial backlog in the processing of these customer claims. *Com-*

pounding the undue stress placed on the reparation program, certain Federal district courts have taken the unfortunate position that Congress intended reparations to be the exclusive forum for adjudicating commodity customer claims. (See *Bartels* v. *International Commodities Corp.*, 435 F.Supp. 865, 870 (D.Conn. 1977) and *Churchwell* v. *Rosenthal & Co.*, Civ. Act. No. 77-F-252 (D.Col. April 4, 1977).) In order to alleviate the burden on the Commission's reparation program, the committee adopted an amendment that provides—for reparation complaints where the amount claimed as damages does not exceed $5,000—that a hearing be held only on the novel or basic issues that are determinative of the case. Thus, *an aggrieved commodity customer will be able to obtain more expeditious treatment of his claim should the customer elect to pursue a claim in reparations rather than proceed to arbitration or pursue in court the private right of action which has been judicially implied for violations of certain provisions of the Commodity Exchange Act, or which in the future courts may recognize for other provisions of the act.* [citations omitted, but see n.7 and n.9, *supra*]"

124 Cong. Rec. S10537 (daily ed. July 12, 1978) (emphasis added).

After certain changes not relevant here were made by the Conference Committee, the 1978 amendments were passed by both houses of Congress on September 28-29, 1978 and became the Futures Trading Act of 1978, P.L. No. 95-405. Senator Leahy, manager of the bill, chairman of the Senate subcommittee that reported the bill, and one of the Senate conferees in the conference committee, introduced the conference version of the bill with these remarks:

"S.2391 creates a statutory cause of action, in Federal district courts, for States to seek injunctive relief or damages, or both, for violations of the Commodity Exchange Act or Commission regulations thereunder, that

> would exist in addition to any causes of action under State general civil or criminal antifraud laws that are not preempted by the Act.... *In those actions brought by a State under this bill, a customer who makes an informed, voluntary election to have his State sue on his behalf to recover monetary damages for a particular violation would thereby extinguish that person's other alternatives for redress: arbitration, reparations, or judicially implied private rights of civil actions under the Act.*"

124 Cong. Rec. S16527 (daily ed. Sept. 28, 1978) (emphasis added).

Against all this, petitioners assert there is a conflict between an implied private action and the Congressional decision to concentrate regulatory authority in the CFTC, and argue that allowing private actions would result in conflicting decisions under the CEA.

However (relying on the implied action, see pp. 30-32, *supra*), Congress required that commodity exchanges provide for an arbitration procedure. § 5a(11) of the CEA, 7 U.S.C. § 7a(11). Use of these arbitrators, who are not employees of the CFTC or otherwise subject to its control, cuts against the cohesion argument and in favor of supplementary, "remedial" legislation.

Moreover, Congress did not require that all appeals from CFTC determinations be heard in one court, as it has done in other statutes.

Finally, and perhaps most conspicuous, antitrust and Justice Department jurisdiction were preserved through the savings clause in CEA Section 7a(11). See Senate Hearings pp. 257-62. How could the legislators have wanted "unequivocal" antitrust applicability, and unfettered arbitration and appeals of the administrative law judges to different federal courts, but decided to eliminate implied private suits in district court on the basis of a cohesiveness argument?

Finally, an exclusionary reading is contrary to the extensive legislative history.[13]

In these compelling circumstances, the Second Circuit correctly apprehended and (via an Act, rather than section analysis, JA 159-164) applied this Court's recent decisions to uphold the implied private action by (i) *per force* operation of the re-enactment canon of statutory interpretation, *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) and (ii) a finding that petitioners here could not rebut the presumption that Congress approved of the prior judicial decisions. (JA 143-146)

Conclusion

The judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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13. Petitioners, on the most charitable reading of their motives, are not wholly disinterested in seeking to have the reparation remedy made exclusive. The CFTC reparations procedure is seriously backlogged, and the reparations section is not adequately staffed to handle the extra workload which would result if all complaints were forced into the reparations process (Commodity Futures Trading Commission, 1979 Annual Report, at 29).

No. 80-757

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REPLY BRIEF OF PETITIONERS NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI

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No. 80-757

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Respondents and the CFTC do not address the issues presented

The issue is whether there is a private cause of action for damages against a contract market and its officials under § 5(d), § 5a(8) or § 9(b) of the Commodity Exchange Act (the "CEA"). In their argument of the issue, respondents Leist, Smith and Incomco (collectively "Leist") and

amicus curiae Commodity Futures Trading Commission ("CFTC")

—ignore the language of the statutory provisions in issue (Ex. Br. 12-16). These provisions are not right-conferring or for the especial benefit of an expressly identified class. *Cannon* v. *University of Chicago,* 441 U.S. 677, 690 (1979). To the contrary, they are licensing, prescriptive and criminal statutes for the protection, as § 3 of the CEA makes clear, of the "public generally" and of buyers, sellers and handlers of commodities against price fluctuations caused by speculators such as Leist.

—ignore the comprehensive express remedies against contract markets provided by the CEA (Ex. Br. 17-18). Those remedies include suspension or revocation by the CFTC of contract market designation, the entry of cease and desist orders and the imposition by the CFTC of civil penalties of up to $100,000, criminal penalties and injunctions or writs of mandamus issued by the district courts upon application of the CFTC.

—ignore that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453, 458 (1974) ("*Amtrak*") (Ex. Br. 16). They thus ignore the Court's reiteration of this principle before the enactment of the Commodity Futures Trading Commission Act of 1974 (the "CFTCA") upon which they so heavily rely. The CFTC does not even cite *Amtrak.*

—ignore the legislative history of the enactment of § 5(d), § 5a(8) and § 9(b) in 1921, 1922, 1936 and 1968 (Ex. Br. 24-31). They thus ignore that the Packers and Stockyards Act of 1921 contained an express cause of action for damages, while the contemporaneously

enacted Future Trading Act of 1921 (the predecessor of the CEA) did not, that when the criminal proscription of manipulation in § 9(b) was enacted in 1936 Congress had before it *Wallace* v. *Cutten*, 298 U.S. 229, 237 (1936) which held, as did *Amtrak*, that " '[t]o supply omissions transcends the judicial function' " and that when paragraph (8) was added to § 5a in 1968 Congress did not enact a proposed express private damage remedy against contract markets.

—ignore that when in 1974 Congress enacted the CFTCA it did not enact a proposed express private damage remedy against contract markets, that it exempted contract markets from the reparations remedy it did enact and that it enacted the express provision of § 6c which authorizes the CFTC to seek injunctions or writs of mandamus against contract markets in the district courts (Ex. Br. 34-35, 17-19).

—and ignore that Congress exempted contract markets from the *parens patriae* damage remedy provided by the Futures Trading Act of 1978 (Ex. Br. 19-20).

Instead, although the enactment of the CFTCA was preceded by only one appellate decision "implying" a private damage remedy against a contract market, Leist and the CFTC argue that Congress as a whole was aware of such judicial "implication" of damage remedies under the CEA by reason of committee testimony, two references on the floor of one house and a reference in one report to a "growing body of opinion" (CFTC Br. 11-12). Building upon this supposed awareness on the part of Congress as a whole, they assert that "it must be presumed" (CFTC Br. 7) that Congress intended to continue such "implied" remedies. The argument is that, as the majority below put it (JA 128), Congress in 1974 "implicitly approved" the judicially-created remedy against contract markets.

A decision which is founded upon presumed implicit approval by Congress of one intermediate appellate

decision is—at least in the face of all the contrary evidence of statutory language and structure and legislative history—forbidden judicial lawmaking (Ex. Br. 32 n.*). This is underlined by the CFTC's reference to "the particular standards to be applied in determining liability, an issue that remains to be resolved by the lower federal courts" (CFTC Br. 24 n.25).

The various issues repeatedly presented to the Court in respect of the "implied" cause of action under § 10(b) of the Securities Exchange Act of 1934 provide a close analogy and a substantial reason why the Court should reverse the lawmaking indulged in by the majority below. The majority noted with approval "the process of delineating the precise contours of the private cause of action under the CEA, aided of course by the securities law analogy . . ." (JA 119 n.15). The Court of Appeals for the Sixth Circuit in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 236 (6th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (Apr. 20, 1981) (No. 80-203), also approved "the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5."

The courts, including this Court, are invited to legislate not only the existence of the remedy, but what measure of culpability is required, to whom the remedy is available, whether there shall be contribution among defendants and all the other questions inherent in the judicial implication of a remedy not provided for by Congress. The claim of respondent Incomco, which was interested in the cash commodity not in the allegedly manipulated futures contract, exemplifies the enormity of the claims which might be made and emphasizes the constitutional imperative that Congress, not the judiciary, determine the existence and elements of any remedy.

The language of § 5(d), § 5a(8) and § 9(b) does not permit the inference of a private cause of action

The Court recently said in *Universities Research Ass'n* v. *Coutu*, 101 S.Ct. 1451, 1461 (1981), that "[w]e turn first to the language of the Act itself," in *California* v. *Sierra Club*, 101 S.Ct. 1775, 1779 (1981), that "[i]n ascertaining [congressional] intent, the first consideration is the language of the Act," and in *Northwest Airlines, Inc.* v. *Transport Workers Union*, 101 S.Ct. 1571, 1580 (1981), that "[i]n matters of statutory construction, it is appropriate to begin with the language of the statute itself." *

Despite the Court's repeated emphasis upon statutory language in determining congressional intent to create a private right of action, Leist and the CFTC, like the majority below, give it no weight at all. The Leist brief contains not a word about the language of the provisions asserted as the basis for an implied private remedy. The CFTC dismisses the subject in a footnote in which it concedes, "[t]o be sure, the explicit 'right creating' language that the Court also relied on in *Cannon* (see 441 U.S. at 690-693 n.13) is not present here" (CFTC Br. 25 n.26). It dismisses this crucial concession by quoting the wholly circular statement of the majority below that "the form in which [congressional] intent is expressed cannot be permitted to become an obstacle to its realization" (*ibid.*, quoting JA 160).

The language of § 5(d), § 5a(8) and § 9(b) evidences no intention by Congress to create a private damage remedy

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* "Under the traditional common-law analysis . . . the primary question is whether the statute was enacted for the special benefit of a particular class of which the plaintiff is a member . . . . As we have held in the past, '[t]hat question is answered by looking to the language of the statute itself.' *Cannon* v. *University of Chicago*, 441 U.S. 677, 689." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 101 S.Ct. 2615, 2633 (1981) (Stevens, J., concurring in the judgment in part and dissenting in part).

for their enforcement. The sections provide one criterion for the CFTC's designation of contract markets, require contract markets to enforce their rules which the CFTC has approved and make manipulation a criminal offense. They do so for the "public generally" and all those "engaged in the business of buying and selling commodity and the products and by-products thereof . . ." (CEA, § 3).*

The statutory scheme of the Commodity Exchange Act does not permit the inference of a private cause of action

That Congress did not intend to create a private remedy under § 5(d), § 5a(8) or § 9(b) also appears from the structure of the CEA. As the Court said in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 101 S.Ct. 2061, 2069 (1981), *quoting Northwest Airlines, Inc., supra*, 101 S.Ct. at 1584:

> "'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'"

Although Leist and the CFTC do not address the array of express remedies against contract markets provided by the CEA, its significance could hardly have been overlooked by them. When the *parens patriae* remedy was enacted in the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865, the Senate Report described the "many customer protections and remedies" of the CEA, including the reparations procedure and the CFTC's "power to sue directly for injunctive relief and to invoke a full range of administrative remedies where appropriate

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* That speculators form part of the market does not support the conclusion drawn by the majority below (JA 136) that they are among those for whose "especial benefit" the CEA, or, more accurately, the sections in issue were enacted.

to curb unlawful behavior;" no mention was made of any "implied" private cause of action. S. Rep. No. 850, 95th Cong., 2d Sess. 12-13 (1978).

As the Court said in *Middlesex County Sewerage Authority, supra,* 101 S.Ct. at 2623, after reviewing the express statutory remedies available against petitioners there:

> "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens. . . . As we stated in *Transamerica Mortgage Advisers, supra,* 'it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' 444 U.S., at 19, 100 S.Ct., at 247. See also *Touche Ross & Co.* v. *Redington, supra,* 442 U.S., at 571-574, 99 S.Ct., at 2486-2488. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

In contrast to the express administrative, injunctive and criminal remedies against contract markets, the two express monetary remedies available under the CEA, the reparations procedure of § 14 and the *parens patriae* action of § 6d, are, by their terms, inapplicable to contract markets (Ex. Br. 18-19).*

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* The CFTC argues that Congress could not have intended to shield contract markets and their officials from monetary liability to private litigants suing under the CEA because it took "special care to preserve the threat of potentially greater treble damage liability for antitrust violations" (CFTC Br. 19-20). This argument seriously misreads the legislative history.

In fact, Congress "placed great reliance" on the propositions that " 'present law provides an adequate antitrust exemption for those activities of contract markets necessary to achieve valid objectives of the Commodity Exchange Act' " and that " '[u]nder

When the remedies available against contract markets and those from which contract markets are exempted are viewed together, there can be no question but that in the CEA "Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc., supra,* 101 S.Ct. at 1584, *quoted in Texas Industries, Inc., supra,* 101 S.Ct. at 2069.* The Court's analysis in *Northwest Airlines, Inc., supra,* 101 S.Ct. at 1581-82, is equally applicable here:

> "The statutes make express provision for private enforcement in certain carefully defined circumstances, and provide for enforcement at the instance of the Federal government in other circumstances. The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies. It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress." (Footnotes omitted)

Although Leist and the CFTC largely ignore the language and structure of the CEA provisions upon which

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existing law, the conduct of exchanges . . . which is *mandated* by the Commodity Exchange Commission would be exempt from the antitrust laws' " and " 'activities of regulated exchanges approved, as distinguished from mandated, by regulatory agency, are also exempt from the antitrust laws if they are "necessary to make the . . . [regulatory act] work" and no more restrictive than necessary, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963).' " H.R. Rep. No. 975, 93d Cong., 2d Sess. 27-28 (1974) ("House Report").

Assuming that contract markets are responsible under the antitrust laws for conduct such as was involved in *Silver,* it does not follow that failure by a contract market to prevent a manipulation is such conduct although the manipulation itself is by hypothesis a combination on the part of the manipulators that is forbidden by the Sherman Act.

* The CFTC acknowledges that it was created to administer a "comprehensive regulatory structure" (CFTC Br. 10).

they seek to base an implied private remedy, they attribute much significance to the language of the "savings clause" in § 2(a)(1), which provides that "[n]othing in this section [§ 201 of the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389] shall supersede or limit the jurisdiction conferred on courts of the United States or of any State." The savings clause follows clauses granting to the newly created CFTC exclusive jurisdiction over specified transactions while preserving the jurisdiction of the Securities and Exchange Commission ("SEC") and other federal and state regulatory authorities.

The legislative history of § 201 of the CFTCA reveals that Congress focused its attention on whether the exclusive jurisdiction of the new CFTC would preempt that of the SEC and the other federal and state agencies.* The savings clause was the response to the criticism, such as that of Chairman Rodino, that the exclusive jurisdiction given the CFTC would impact "federal-State relationships" because future contracts "are presently enforceable in State courts under recognized commercial law and contract principles;" the exclusive jurisdiction provision "could possibly be read as an attempt to oust even federal courts of jurisdiction" although "antitrust laws are to apply to commodity transactions;" and "if jurisdiction of federal courts were to be withdrawn also, Commission decisions on commodity transactions would be non-reviewable by the judiciary raising,

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* *See* House Report at 28-29; S. Rep. No. 1131, 93d Cong., 2d Sess. 23 (1974) ("Senate Report"); S. Rep. No. 1194, 93d Cong., 2d Sess. 35-36 (1974) (Conference Report).

Leist relies (Leist Br. 32-33) heavily on a statement made by Senator Talmadge, 120 Cong. Rec. 30458-59 (1974), in an effort to show that the savings clause was designed to preserve a previously recognized private cause of action under the CEA. The Senator's remarks, however, do not allude to any such private right. Rather, they strongly suggest that the savings clause, in conjunction with § 412 of the CFTCA, was intended to guarantee that the passage of the CFTCA would not interfere with ongoing investigations by existing regulatory agencies such as the SEC and any judicial proceedings resulting therefrom.

thereby, serious questions of administrative and constitutional law." *

The effort by Leist and the CFTC to uncover evidence of congressional intent to create, or to preserve, a private cause of action in a savings clause is subject to the criticisms that the Court levelled against the similar argument made in *Middlesex County Sewerage Authority, supra*, 101 S.Ct. at 2624. The argument ignores the ambiguity of the clause "concerning the intent of Congress to 'preserve' [implied] remedies" under the very statute in which the clause appears and it "fail[s] to take account of the rest of the enforcement scheme expressly provided by Congress. . . ."

The legislative history of § 5(d), § 5a(8) and § 9(b) does not permit the inference of a private cause of action

The analysis of legislative history by Leist and the CFTC, like that of the majority below, is fundamentally flawed by their exclusive reliance on the enactment in 1974 of the CFTCA. The legislative history of the enactment of § 5(d), § 5a(8) and § 9(b) in 1921, 1922, 1936 and 1968 is ignored although, as the majority below stated (JA 111), the CFTCA "did not substantially alter any of the provisions which assertedly form the bases of an implied right of action" and although the determinative record is that of the enacting Congress. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 574-75 n.16 (1979); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 n.11 (1979); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

The CFTC's emphasis upon the enactment of the CFTCA rather than the earlier enactment of the particular sections

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* *Commodity Futures Trading Commission Act: Hearings on S.2485, S.2578, S.2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. 260 (1974) ("Senate Hearings").

of the CEA which are in issue is doubly contradicted by the CFTC itself. To avoid the obvious inference to be drawn from the exclusion of contract markets from the *parens patriae* remedy added to the CEA by the Futures Trading Act of 1978, the CFTC comments "[e]ven if this subsequent legislative enactment has any relevance here . . ." (CFTC Br. 20 n.22). In its brief as *amicus curiae* in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran, supra,* the CFTC relies upon the legislative history of the enactment in 1936 of § 4b of the CEA (CFTC *Curran* Br. 25-26).*

The enactment in 1974 of the Commodity Futures Trading Commission Act does not permit the inference of a private cause of action under § 5(d), § 5a(8) or § 9(b)

The CFTC argues (CFTC Br. 8, 10, 13) that Congress "was aware" and "plainly understood" before the enactment of the CFTCA in 1974 that the courts had "uniformly implied private rights of action" under the CEA (CFTC Br. 8). The CFTC principally relies (CFTC Br. 11-12)

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* The CFTC also relies (CFTC Br. 15) on the Court's decision in *Posados* v. *National City Bank*, 296 U.S. 497 (1936), but that decision not only denies the significance the CFTC seeks to attach to the reprinting of the text of the CEA in the House and Senate Reports on the CFTCA (CFTC Br. 14 n.10) but also demonstrates the error in the CFTC's exclusive focus on the latter enactment:

> "The amendment is made in a well-approved form—a form which, indeed, many of the states compel by constitutional provision—namely, by repeating the language of the original section with the additions to which we have heretofore called attention. Unless the contrary plainly appear, the employment of such form of amendment is simply to serve the causes of convenience and certainty. . . . It follows that such parts of the original . . . as were copied into the amended section were not thereby repealed and immediately reenacted, but continued, uninterruptedly, to be the law after the amendment precisely as they were before." (*Id.* at 505-06)

on statements made by witnesses during committee hearings in 1973 and 1974 on the proposed legislation.*

That Congressional awareness may not be presumed on so insubstantial a basis was made clear in *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978):

> "We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which . . . is at odds with the language of the section in question and the pattern of the statute taken as a whole. . . ."

Similarly, in *TVA* v. *Hill*, 437 U.S. 153 (1978), the Court refused to presume that the statements found in

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* Most of the excerpts from the hearings cited by Leist and the CFTC are not pertinent to the issue presented here because they refer to entirely different categories of claims, *i.e.*, those subject to the contract markets' own arbitration procedure or to the CFTC reparations procedure, neither of which can be invoked against contract markets and their officials. *Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Committee on Agriculture*, 93d Cong., 1st Sess. 119 (1973) (statement of Reed Clark) (Leist Br. 27, CFTC Br. 11 n.5); *id.* at 197-98 (statements of Leo Melamed and Michael Weinberg, Jr.) (Leist Br. 27-28; CFTC Br. 11 n.5); *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Committee on Agriculture*, 93d Cong., 2d Sess. 52 (1974) (statement of William F. Brooks) (CFTC Br. 12); *id.* at 169 (statement of Frederick G. Uhlmann) (CFTC Br. 12); *id.* at 249 (statement of Charles W. Chapin) (Leist Br. 28, CFTC Br. 12); *id.* at 321 (statement of Sheldon L. Berens) (Leist Br. 28; CFTC Br. 12); Senate Hearings at 403, 415 (statement of Alvin W. Donahoo) (Leist Br. 29-30; CFTC Br. 12); *id.* at 524, 526 (statements of Frederick G. Uhlmann and Warren W. Lebeck) (Leist Br. 31; CFTC Br. 12).

appropriations committee reports expressed the view of Congress. The Court commented that "there is no indication that Congress as a whole was aware of TVA's position, although the Appropriations Committees apparently agreed with petitioner's views" (437 U.S. at 192).

Upon examination, moreover, the committee testimony relied upon by the CFTC does not bear out its assertions that "Congress frequently was informed that private rights of action had been held to exist under the Act" (CFTC Br. 11) and that it was "familiar with the precedents permitting private rights of action under the statutory provisions" here at issue (*id.* at 14 n.10). The Court of Appeals for the Fifth Circuit in *Rivers* v. *Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), *pet. for cert. pending*, 49 U.S.L.W. 3712 (filed Mar. 24, 1981) (No. 80-1542), drew a very different conclusion:

> "Stated charitably, we are less certain than are the plaintiffs and several of our sister courts that these few fleeting references—sometimes cryptic and all comparatively isolated among the hundreds of pages of testimony and debate that comprise the legislative history of the 1974 Act—are sufficient to establish that the *entire* Congress was even aware of and duly considered the existence of any previously inferred cause of action in its deliberations and vote upon the CFTCA." (634 F.2d at 786) (Emphasis in original; footnote and citations omitted)

The legislative history contains, however, striking evidence that Congress did not wish to create a private damage remedy against contract markets. It did not enact the private damage remedy proposed in § 505 of S. 2837, 93d Cong., 1st Sess. (1973) (Ex. Br. 34-35), just as it did not enact the private remedy proposed in § 32 of H.R. 9178, 90th Cong., 1st Sess. (1967), when it amended the CEA in 1968 (Ex. Br. 27-28). *Cf. Universities Research Ass'n,*

supra, 101 S.Ct. at 1465; *Complete Auto Transit, Inc.* v. *Reis*, 101 S.Ct. 1836, 1843-44 (1981).*

Both the CFTC and Leist gloss over the fact that prior to the enactment of the CFTCA in 1974 there was scant authority concerning an "implied" right of action against a contract market. The CFTC cites eleven decisions as "implying" a private right of action (CFTC Br. 8-9); Leist refers to these same decisions as fourteen (Leist Br. 20-21 n.7). Both the CFTC and Leist fail to mention that only two of these decisions, *Deaktor*** and one district court decision, "implied" a private remedy against a contract market (Ex. Br. 33 & n.*). In none of the other decisions was the defendant a contract market. Almost all the decisions cited by the CFTC (CFTC Br. 8) of which Congress was supposedly aware involved actions by a customer against his broker under § 4b of the CEA. Whether there

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* The CFTC's contention that Congress rejected S. 2837 in its entirety "in favor of substantial amendment of the existing Act" (CFTC Br. 15 n.12) is inaccurate. Four key provisions of S. 2837 were incorporated substantially verbatim in the modified version of H.R. 13113, 93d Cong., 2d Sess. (1974), that was ultimately approved by the Senate committee and passed by the Senate. *Compare* S. 2837, §§ 203, 208(b)-(d), 211 and 303(a)(2) (reprinted in Senate Hearings at 79 *et seq.*) *with* H.R. 13113 (as amended), §§ 216, 315, 314 and 316 (reprinted in 120 Cong. Rec. 30409 *et seq.* (1974)). *See* Brief *Amici Curiae* on Behalf of Ten United States Commodity Exchanges at 21-22. Indeed, §§ 203, 211 and 208(b)-(d) of S. 2837 were enacted with only minor changes as §§ 216, 414 and 415 of the CFTCA, 7 U.S.C. §§ 12*e*, 20 and 6g(2)-(6). Because "the differences between the provisions of the various Senate bills, and the House bills" were considered (Senate Report at 20) and selected provisions of S. 2837 were retained by Congress, the deletion of § 505(a) cannot be dismissed as insignificant.

** *Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.). *rev'd on other grounds per curiam sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). The only issue reached by this Court in *Deaktor* was that of primary jurisdiction. This Court did not reach the issue of whether the Seventh Circuit had correctly implied a private cause of action against a contract market.

is such a cause of action is the issue in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran, supra*—an issue closely analogous to that decided in the negative in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). The context of the CFTCA did not contain anything analogous to the "'long-established and familiar principl[e]' of maritime law" that was at issue in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 263 (1979), upon which the CFTC relies (CFTC Br. 13).

Leist and the CFTC further err in equating supposed congressional awareness with intent to approve a private cause of action for damages. In a line of decisions refusing to apply the "reenactment canon" relied upon by the majority below (JA 144), this Court has been extremely reluctant to presume legislative endorsement of judicial opinions from silence without some affirmative expression of congressional approval. In *Girouard* v. *United States*, 328 U.S. 61 (1946), the Court refused to infer that a statutory reenactment evidenced approval of three earlier decisions which the Court determined had been wrongly decided:

> "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. . . . The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer*, *Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rules of those cases." (328 U.S. at 69-70)

Similarly, in *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235, 241-42 (1970), the Court declined to find that Congress had approved an earlier decision of the Court where the pertinent legislative history lacked "any persuasive circumstances evidencing a clear design"

to approve the decision. *See also Aaron* v. *SEC*, 446 U.S. 680, 700 n.18 (1980); *NLRB* v. *Plasterers' Local 79*, 404 U.S. 116, 129-30 (1971); *United States* v. *Powell*, 379 U.S. 48, 55 n.13 (1964); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947).

As the majority below concluded (JA 127), the CFTC contends that "this case does not involve the question whether Congress intended *to create* a private right of action" but rather "whether Congress intended *to abolish* a previously recognized private remedy" (CFTC Br. 13, emphasis in original). This formulation—this shift in the burden of inquiry—is not analysis of congressional intent, but rather judicial legislation under the guise of deference to congressional intent. This formulation turns on its head the rule emphasized in the Court's recent decisions, which requires an affirmative showing of congressional intent to create a private remedy. In *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 571, the Court rejected the argument of SIPC "that because Congress did not express an intent to deny a private cause of action under § 17(a), this Court should infer one" and concluded that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best."

Finally, even in 1974, Congress had not forgotten the distinction between the functions of the legislature and of the judiciary. Chairman Rodino urged Congress to clarify certain ambiguities in § 201 of the CFTCA regarding the continued operation of the antitrust laws *vis-a-vis* contract markets because:

> "As late as April 24, 1974, the Supreme Court reiterated, 'Courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' *Kahn* v. *Shevin*, No. 773-78 (U.S. April 24, 1974)." (Senate Hearings at 259)

Congress responded by enacting § 412 and the savings clause in § 201 of the CFTCA. Congress was aware that it could not delegate its lawmaking powers to the courts through silence. In short, the jurisprudence of 1974 was not so different from that of today that Congress might expect a private cause of action under the CEA to float on nothing more substantial than the context surrounding the enactment of the CFTCA.

The judicial implication of a private cause of action is impermissible

Leist argues (Leist Br. 18) that a damage remedy under the CEA is necessary because "the only true deterrent to large manipulators, the only disagreeable, unglamorous penalty which forces exchange and brokerage house personnel to staff and listen to their compliance departments, is the certitude of large damage suits from every investor harmed by their enlistment in, or feigned ignorance of, the manipulation." As the Court noted in *Complete Auto Transit, Inc.* v. *Reis, supra,* 101 S.Ct. at 1845 n.18, a proposition such as this "is questionable on its own terms, overlooks an array of potential remedies that are available . . . apart from a damages remedy . . . and in any event was rejected by Congress."

In *Northwest Airlines, Inc., supra,* 101 S.Ct. at 1583, and again in *Texas Industries, Inc., supra,* 101 S.Ct. at 2070, the Court observed that a distinction must be drawn between judicial interpretation and judicial legislation:

> "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has not decided to adopt."

This fundamental difference was appreciated by the Court of Appeals for the Fifth Circuit, which, in *Rivers* v. *Rosenthal & Co., supra,* refused to infer a private right of action under § 4b of the CEA:

> "Th[e] conclusive reliance upon congressional intent in the evaluation of claims of implied rights of action is not simply an expedient tool or canon of construction, but is rooted in the limitations of the functional role allotted the judiciary . . . . Although we may breathe practical life into them, the federal judiciary —endowed with no legislative or policy making authority—has no power to 'imply' or otherwise to create private causes of action supplementary to express statutory schemes. Rather, we may only recognize or infer rights of action affirmatively created by the Legislative Branch. . . ." (634 F.2d at 781-82 n.11) (Citations omitted)

As the Court said in *Diamond* v. *Chakrabarty,* 447 U.S. 303, 317 (1980) (*quoted in Texas Industries, Inc., supra,* 101 S.Ct. at 2070):

> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of Government, the Congress and the Executive, and not to the courts."

Such considerations as are advanced by Leist here

> "are properly addressed to Congress, not to the federal courts. Congress is best able to evaluate these policy

> considerations. . . . 'The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.' *United States* v. *Gilman*, 347 U.S. 507, 511-513, 74 S.Ct. 695, 697-698, 98 L.Ed. 898." *Northwest Airlines, Inc., supra*, 101 S.Ct. at 1584 n.41.

Again, in *California* v. *Sierra Club, supra*, 101 S.Ct. at 1781, the Court said:

> "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."

The frequency with which this Court has been asked in recent Terms to address "the recurring question of implied causes of action," *California* v. *Sierra Club, supra*, 101 S.Ct. at 1779, indicates that the dockets of the federal courts at all levels will continue to be clogged by "implied" private right of action cases unless the reluctance of the trial and appellate courts to give up the "implication" of private causes of action is overcome.

That reluctance is grounded in the mistaken, albeit sympathetic, belief that the federal courts must provide a forum and a remedy, although Congress has provided none, for every private grievance that has some relationship to federal legislation or regulation. If the search for congressional intent concerning the creation of private remedies is permitted to go beyond its expression in positive enactment and if such intent may supposedly be found in congressional silence, as has happened here, this Court's decisions will have changed nothing.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, ET. AL., PETITIONERS
v.
NEIL LEIST, ET AL.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., PETITIONER
v.
NEIL LEIST, ET AL.

HEINOLD COMMODITIES, INC., ET AL., PETITIONERS
v.
NEIL LEIST, ET AL.

HEINOLD COMMODITIES, INC., ET AL., PETITIONERS
v.
NATIONAL SUPER SPUDS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Congress' comprehensive reform in 1974 of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, extinguished the private civil action that had previously been recognized to exist for traders in a commodity futures contract against (i) a commodity exchange that breached its statutory duties to enforce its rules (Section 5a(8) of the Act, 7 U.S.C. 7a(8)) and to prevent manipulation of the price of the contract traded on the exchange (Section 5(d) of the Act, 7 U.S.C. 7(d)); and (ii) futures commission merchants who participated in the price manipulation in violation of Section 9(b) of the Act, 7 U.S.C. 13(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-757

NEW YORK MERCANTILE EXCHANGE, ET AL., PETITIONERS

v.

NEIL LEIST, ET AL.

No. 80-895

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., PETITIONER

v.

NEIL LEIST, ET AL.

No. 80-936

HEINOLD COMMODITIES, INC., ET AL., PETITIONERS

v.

NEIL LEIST, ET AL.

HEINOLD COMMODITIES, INC., ET AL., PETITIONERS

v.

NATIONAL SUPER SPUDS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

INTEREST OF THE COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission is an independent federal agency created by Congress in 1974 to administer the Commodity Exchange Act, 7 U.S.C. (& Supp. III) 1 *et seq.* The Act establishes a pervasive and exclusive scheme for regulating the trading of commodity futures contracts in the United States. See 7 U.S.C. (Supp. III) 2.

The primary goal of the Act is "to insure fair practice and honest dealing on the commodity exchanges * * *." H.R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935). Congress has enacted two types of prohibitions that are essential to accomplishing this goal. The Act prohibits the manipulation of the price of a futures contract (7 U.S.C. (& Supp. III) 9, 13(b), and 13b) and prohibits commodity professionals from defrauding their customers (7 U.S.C. 6b). The Commission's interest here concerns the aspects of these cases relating to price manipulation.[1]

The court of appeals upheld the right of members of the public who trade in the futures markets to obtain civil redress from commodity exchanges that fail adequately to enforce their rules and to protect their marketplaces from price manipulation. The court of appeals also held that such traders may bring private actions against futures commission merchants who participate in price manipulations. In the Commission's view, this decision is correct and accords with the congressional intent underlying the provisions of the Act involved here. In addition, because establishing that a manipulation has occurred, or that an exchange has breached its self-regulatory duties, often requires costly and complex litigation, private rights of action in this context are particularly important supplements to the Commission's enforcement efforts. Moreover, the possibility of private suits provides a meaningful incentive for commodity exchanges to exercise an appropriate degree of vigilance in performing their self-regulatory duties, including the prevention of market manipulations and other abuses. Thus, the Commission has a strong interest in the question whether private rights of action continue to be available under the Act.

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[1] See page 5, note 2, *infra*. On April 20, 1981, this Court granted the petition for a writ of certiorari in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203, which presents the question whether a customer has a private right of action against its futures commission merchant for fraud in violation of 7 U.S.C. 6b.

STATEMENT

A. INTRODUCTION

A commodity futures contract is a standardized agreement to purchase or sell a fixed quantity of a particular commodity; the quality or grade of the commodity to be purchased or sold, as well as the month and place of delivery, are specified in the contract (A. 88). Contracts may be lawfully traded only through a board of trade ("commodity exchange") that has been designated by the Commission as a "contract market" for the particular commodity. See 7 U.S.C. 6, 6h, 7(g). The price of the commodity, the only term not specified in the contract, is set by open bidding in a designated floor trading area (the "pit" or "ring") of the exchange. Members of the public place orders for contracts through brokers ("futures commission merchants") who are responsible for executing and confirming the orders and for maintaining records of their customers' positions and completed transactions (see 7 U.S.C. (Supp. III) 2; A. 90–91). A contract is formed whenever there is a match in the pit between a bid and an offer (A. 90–91). The party promising to deliver the commodity under the contract is called the "short"; the party promising to take delivery is called the "long" (A. 89). Delivery actually occurs in only about 2–3% of all futures transactions, however, because most contract positions are liquidated by traders who offset their "long" and "short" positions (A. 89–90 & n.2).

Members of the public who trade in these contracts are classified as "hedgers" or "speculators." Hedgers are typically persons engaged in the production, distribution, or processing of a commodity or its byproducts, and they typically trade in the futures market to insure against loss. For instance, a grower of potatoes may establish a "short" position in the futures contract for potatoes to minimize the risk of a decline in the price of potatoes between planting and sale. A speculator, on the other hand, is typically not engaged in a commercial enterprise that produces or uses the particular commodity in which he trades, but hopes to profit by successfully anticipating price movements. The futures markets function successfully only when speculators are trading in the markets and assume the risk of price movements that hedgers seek to avoid (A. 92–94).

B. THE MAY 1976 POTATO FUTURES CONTRACT DEFAULT

These cases arise out of an unprecedented default by certain "short" traders with respect to the May 1976 potato futures contract that was traded through the facilities of petitioner New York Mercantile Exchange (A. 95–105). The "short" traders placed their contract orders through petitioners Clayton Brokerage Co. of St. Louis, Heinold Commodities, and Thomson & McKinnon Auchincloss Kohlmeyer, all of whom are registered futures commission merchants. Essentially, the "short" traders established substantial "short" positions, which they failed to liquidate; they were therefore required under the contract to make delivery of the potatoes, which they were unable to do (A. 97).

Respondents are traders who held "long" positions in the contract. They brought these actions in the United States District Court for the Southern District of New York, seeking damages for the substantial harm they allegedly suffered because of petitioners' violations of the Act. Although respondents had liquidated their "long" positions before the "short" traders defaulted, the "long" traders claim that they were injured because of the "short" traders' and futures commission merchants' manipulation of the contract price, which allegedly precipitated the default (A. 15–59). Certain respondents also contend that they suffered financial injury because the Exchange allowed this price manipulation to occur (although it knew or should have known of these practices) in violation of the Exchange's rules, and despite its statutory duties to prevent manipulation (7 U.S.C. 7(d)) and to enforce its rules (7 U.S.C. 7a(8)). See A. 34–35. One respondent also contends that the Exchange's actions violated the federal antitrust laws (A. 7–14).

C. DISTRICT COURT PROCEEDINGS

After respondents' actions had been consolidated and discovery was completed, the Exchange and the futures commission merchants moved for judgment on the pleadings or, alternatively, for partial summary judgment. Among other things, they claimed that a private right of action no longer existed under the Commodity Exchange Act, and the district court granted partial summary judgment on that ground (A. 76–77).

The court acknowledged that private rights of action had been recognized under the Act before 1974 (A. 66), but it noted that the Act had been "amended extensively" in 1974 (A. 67) and concluded that a private cause of action had not survived the 1974 amendments (A. 74–75). Relying on the test articulated by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), the district court held that "there is no private right of action under the Act because the two critical elements of the test, congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right" (A. 71–72; footnote omitted).

D. THE COURT OF APPEALS DECISION

The court of appeals reversed by divided vote (A. 83–249), holding that private rights of action should continue to be available under the Act with respect to the statutory violations allegedly committed by petitioners.[2] Writing for the majority, Judge Friendly thoroughly reviewed the language, structure, and legislative history of the Act against the requirements of *Cort*, but found this case to involve "one differentiating factor of * * * transcendent importance" in that "the decisions prior to the 1974 amendments had uniformly upheld the existence of

[2] Among other things, the court of appeals stated (A. 171–173) that the complaints here may have been sufficient to allege violations of Sections 4a and 4b of the Act, 7 U.S.C. 6a and 6b. In the Commission's view, respondents' allegations are insufficient to establish violations of these sections. Section 4a of the Act generally prohibits traders who are speculators from exceeding position limits established by the Commission. Futures commission merchants, like certain of the petitioners, cannot be held to have violated this prohibition except in circumstances where they are trading for their own account or benefit. 7 U.S.C. 6a(4). In this case, it is alleged merely that these petitioners "permitted" their customers to exceed speculative limits (A. 54). Section 4a does not reach this form of broker activity. See H.R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). Similarly, a violation of Section 4b will be found only where the party committing the alleged fraud acted "for or on behalf of" the defrauded party. 7 U.S.C. 6b(A). See *Gordon* v. *Shearson Hayden Stone Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,016, at 23,976, 23,980–23,981 (Apr. 10, 1980), appeal pending, No. 80-7212 (9th Cir.). Compare A. 171–173. In this case, it is not alleged that the petitioner futures commission merchants were acting "for or on behalf of" the allegedly defrauded persons, and the complaints therefore fail to state a violation of Section 4b. Accordingly, we do not here address the question whether a private right of action exists under these sections.

a private cause of action under the provisions of the Commodity Exchange Act, and * * * the 1974 Congress was well aware of the existing state of the law" (A. 127). Thus, the court found that the question presented was not "whether Congress intended to create a new private right of action in 1974, but rather whether it intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act" (*ibid.*).

Because Congress recognized that "speculators" perform an essential role in the futures markets, the court of appeals found that such persons were within the class to be protected by the Act (A. 129–137). The court also noted that the 1974 Congress, rather than evidencing an intent to eliminate private rights of actions, had enacted a provision to preserve explicitly the jurisdiction of the courts with respect to commodity claims (A. 144–146, 150). The court found that the insertion of this provision, especially when considered in light of Congress' clear understanding that private causes of action had previously been implied under the Act, made "irresistible" the conclusion that "Congress desired their continued recognition" (A. 156). Finally, the court found that recognition of private rights of action was both consistent with and helpful to the purposes of the Act, and that this area had not traditionally been subject to state law (A. 169–170).

Judge Mansfield dissented. He was not persuaded that a private right of action had been implied before 1974 in circumstances such as those presented here (A. 222–223). Moreover, Judge Mansfield disagreed with the majority's statement of the issue. In his view, the issue was properly analyzed in terms of whether the evidence showed that Congress had intended in 1974 "to approve" the continued availability of private rights of action (A. 234–235). Finding insufficient evidence of such an affirmative intent, Judge Mansfield would have affirmed the judgment of the district court (*ibid.*).

SUMMARY OF ARGUMENT

This Court's recent decisions emphasize that implication of a private right of action presents a question solely of congres-

sional intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979). This Court has not, however, previously considered the question whether a private right of action exists under a federal statute in circumstances similar to those presented here. The special character of this case stems from the fact that Congress extensively amended the Commodity Exchange Act in 1974, after numerous courts of appeals and district courts had without exception found private remedies to exist on behalf of commodity traders under various provisions of the Act. In 1974, Congress plainly was aware that the courts had recognized such remedies, and there is no suggestion in the language or legislative history of the 1974 amendments that Congress either disapproved of these remedies or intended to abrogate them. Likewise, based on the law relating to implied causes of action as it existed in 1974, Congress had every reason to believe that private remedies would continue to be available under the Act, without any further legislative action. In these circumstances, even more so than in those analyzed in *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979), it must be presumed that Congress intended that previously recognized private rights of action would continue to be available under the Act.

Even if Congress were required affirmatively to demonstrate its intent to preserve private rights of action under the Act, the language and legislative history of the 1974 amendments supply that evidence. In connection with a provision mandating that the Act preempt all regulatory laws that might otherwise apply to futures trading, Congress enacted a provision that explicitly preserved the jurisdiction of federal and state courts to adjudicate commodity claims. This savings clause was, among other things, obviously intended to permit the courts to continue to entertain private actions under the Act. In addition, Congress rejected the suggestion of the exchanges that they be granted immunity from such private civil actions. Instead, Congress broadened the self-regulatory duties of the exchanges, and thereby expanded the potential liability of exchanges in private suits brought by persons trading through their facilities.

ARGUMENT

I. When Congress Comprehensively Amended the Commodity Exchange Act in 1974, It Was Aware That the Courts had Uniformly Implied Private Rights of Action Under the Act, and It Indicated No Intention to Overrule Those Decisions or Abolish Those Remedies

A. WITHOUT EXCEPTION, THE COURTS RECOGNIZED THAT TRADERS COULD BRING PRIVATE ACTIONS UNDER THE COMMODITY EXCHANGE ACT BEFORE 1974

The question whether a private cause of action was available under the Commodity Exchange Act appears to have been first decided in 1967 (see A. 120 n.16), when the United States District Court for the Northern District of Illinois held that certain commodity traders could bring suit against their futures commission merchants, who had allegedly defrauded them in violation of Section 4b of the Act, 7 U.S.C. (1964 ed.) 6b. *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440, 447 (1967). Without exception, other courts thereafter reached the same result, upholding private rights of action under various provisions of the Act. See *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 437 (N.D. Cal. 1968), modified, 430 F. 2d 1202 (9th Cir. 1970); *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth* v. *Peavey Company Commodity Services*, 430 F. 2d 132, 133 (8th Cir. 1970); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338, 1343 (E.D. La. 1972); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294, 295 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 766 (S.D. N.Y. 1972); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61, 65 (M.D. Pa. 1973); *Deaktor* v. *L.D. Schreiber & Co.*, 479 F. 2d 529, 534 (7th Cir.), rev'd on other grounds *sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), aff'd on other grounds, 550 F. 2d 762 (2d Cir.), cert. denied, 434 U.S. 823 (1977). By 1974, therefore, it was "undisputed that a private cause of action may be maintained under

the Commodity Exchange Act." *Case & Co.* v. *Board of Trade of the City of Chicago*, 523 F. 2d 355, 360 (7th Cir. 1975). See also *Rivers* v. *Rosenthal & Co.*, 634 F. 2d 774, 779 (5th Cir. 1980) (emphasis in original), petition for cert. pending, No. 80–1542 (filed Mar. 10, 1981) ("all courts that decided the issue held unanimously that such a private cause of action was available under the CEA as constituted *prior to 1974*").

For present purposes, as the court of appeals correctly noted (A. 121), the most important of the cases decided prior to 1974 is *Deaktor* v. *L.D. Schreiber & Co.*, *supra*, in which the Seventh Circuit upheld a private right of action on behalf of traders against a contract market and certain of its member firms. Two cases had been consolidated in *Deaktor*. In one case, "short" traders in a particular contract on the Chicago Mercantile Exchange alleged that they suffered financial harm because various members of the Exchange had manipulated and cornered the market in that contract, and the Exchange had failed to enforce its rules, as required by Section 5a(8) of the Act, 7 U.S.C. (1970 ed.) 7a(8). See 479 F. 2d at 530. In the other case, persons who had traded in another contract alleged that the Exchange and certain of its member firms had manipulated the price of the contract in violation of Section 9(b) of the Act, 7 U.S.C. (1970 ed.) 13(b). See 479 F. 2d at 530.

The Seventh Circuit recognized (479 F.2d at 534) that the Act was "at least in part intended to protect the interests of the plaintiff-traders," and it therefore held that "a private cause of action exists under the Commodity Exchange Act in favor of the plaintiffs in these actions." The court also rejected the defendants' contention that the actions should be stayed pending the Commodity Exchange Commission's exercise of primary jurisdiction (479 F. 2d at 533–534). This Court reversed the judgment of the court of appeals with respect to the primary jurisdiction question. 414 U.S. 113. The Court held (*id.* at 115; emphasis added) that "the *Deaktor* plaintiffs, who * * * alleged violations of the [Act] and the rules of the Exchange, should be routed *in the first instance* to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case." The significance of the Court's holding is clear inasmuch as it shows that this Court in 1973 understood that a

private right of action was to be implied under the Act in circumstances similar to those presented here.[3]

B. CONGRESS WAS AWARE IN 1974 THAT THE FEDERAL COURTS HAD BEEN ADJUDICATING PRIVATE CLAIMS UNDER THE ACT

In 1974, Congress undertook a thorough reappraisal of the Commodity Exchange Act,[4] which resulted in "the first complete overhaul of the * * * Act since its inception." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974). The 1974 amendments substantially diminished reliance on self-regulation by the contract markets and created the present Commission to administer a "comprehensive regulatory structure." *Ibid.*

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[3] Indeed, the Exchange in *Deaktor* did not even question the existence of a private right of action under the Act. Compare A. 220. To the contrary, in its petition (73-241 Pet. 11), the Exchange supported its primary jurisdiction argument by noting that the "constant threat of harassing suits" had placed it in "an intolerable position." The Exchange noted (*ibid.*) that it "must diligently seek to prevent, deter, and punish violations of its rules; but enforcement of its rules now exposes it to unrestricted attacks in federal courts by disgruntled traders."

[4] Prior to 1974, the Act consisted of legislation enacted in 1922, 1936 and 1968. The Grain Futures Act, ch. 369, 42 Stat. 998 *et seq.*; Commodity Exchange Act, ch. 545, 49 Stat. 1491 *et seq.*; Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258, 82 Stat. 26 *et seq.* The purposes of the Act were to be achieved primarily through the self-regulatory efforts of contract markets. To secure and maintain designation by the Secretary of Agriculture as a contract market, these organizations were required to adopt rules for preventing manipulation and to be capable of enforcing these rules. See 7 U.S.C. (1970 ed.) 7(d), 7a(8). Federal regulators were afforded limited administrative enforcement powers (see 7 U.S.C. (1970 ed.) 8(a), 9, 13b), and enforcement responsibility was divided between the Secretary of Agriculture and the Commodity Exchange Commission, which consisted of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General. See 7 U.S.C. (1970 ed.) 2.

In 1974, Congress was convinced that the Act provided "an outmoded patchwork of regulation" (120 Cong. Rec. 30463 (1974) (remarks of Sen. Clark)). Congress was particularly concerned with: (1) unchecked and undetected market manipulations and abuses; (2) inadequate self-regulation by contract markets; (3) insufficient government enforcement authority; (4) the absence of effective protections for the increasing number of new traders; and (5) the incipient application of state laws and federal securities laws to commodity matters. See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 36-49 (1974); S. Rep. No. 93-1131, 93d Cong., 2d Sess. 18-19 (1974); H.R. Rep. No. 93-963, 93d Cong., 2d Sess. 10, 40-58 (1974). Although Congress eventually amended the existing Act, Congress also considered the possibility of repealing the Act and substituting new legislation. See S. 2485, 93d Cong., 1st Sess. (1973); S. 2837, 93d Cong., 1st Sess. (1973).

During this process of reevaluating and revising the Act, Congress frequently was informed that private rights of action had been held to exist under the Act. The availability of this remedy was discussed mainly in the testimony presented by representatives of the commodity exchanges and other commodity professionals, who urged on policy grounds that Congress should act to repeal private rights of action or, at the least, refrain from enacting additional statutory remedies, if such private remedies were to continue to be recognized. During House hearings in 1973, for instance, the representative of three commodity exchanges urged that the exchanges be granted immunity from private rights of action. He stated that "Congress should take steps to insure that federally regulated exchanges are not exposed to * * * astronomical civil liability suits when they seek to discharge their obligations under the law or to cooperate with the suggestion of the regulatory agency." *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 121 (1973) (statement of Reed Clark) ("*1973 House Hearings*").[5]

In both the Senate and House hearings in 1974, moreover, the president of the Kansas City Board of Trade proposed the insertion of specific language in the Act that would have granted such immunity to contract markets. See *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 123 (1974) (statement of Carlos Bradley) ("*1974 House Hearings*"); *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., pt. 1, 137 (1974) (statement of Mr. Bradley) ("*1974 Senate Hearings*"). See also *1974 House Hearings* at 62–63 (statement of F. Marion Rhodes). Similarly, representatives of commodity professionals and the exchanges testified that proposed statutory grievance procedures—Commission reparation proceedings and contract market arbitration proceedings—would be "superfluous" and cause confusion because commodity "complainants of course, have access to the courts." *1974 House Hear-*

[5] Significantly, the exchanges also based their opposition to certain proposed amendments to the Act on "the prospect of civil liability" that already existed under the Act (*1973 House Hearings* at 119 (testimony of Mr. Clark)), and "the ultimate opportunity of recourse to the courts" (*id.* at 198 (testimony of Michael Weinberg, Jr.)).

ings at 249 (remarks of Charles W. Chapin); *id.* at 321 (remarks of Sheldon Berens). See also *id.* at 52 (remarks of William F. Brooks); *id.* at 169 (remarks of Frederick Uhlmann); *1974 Senate Hearings* at 403, 415 (remarks of Alvin W. Donahoo); *id.* at pt. 2, 524 and 526 (remarks of Mr. Uhlmann and Warren W. Lebeck).

The significance of this testimony was clearly understood. When the chairman of the House Agriculture Committee introduced the bill that was eventually enacted in 1974, he explained that the "courts [had] implied a private remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (1973) (remarks of Rep. Poage). Likewise, the House Report noted the "growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 46 (1974). See also *id.* at 48. Congress was also aware that Section 5a(8) of the Act, 7 U.S.C. (1970 ed.) 7a(8), as enacted in 1968, required contract markets to enforce their rules, "thereby implicitly giving private parties the right to sue for nonenforcement * * *." 120 Cong. Rec. 10748 (1974) (remarks of Rep. Thone).[6]

C. CONGRESS EVIDENCED NO INTENTION TO ABROGATE THE PRIVATE RIGHTS OF ACTION THAT EXISTED WHEN IT AMENDED THE ACT IN 1974

The intent of Congress is the decisive factor in determining whether a private right of action is to be implied under a federal statute. The circumstances in which the

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[6] Moreover, the Conference Committee Report (S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38-39 (1974)) suggests that the 1974 Congress was aware of this Court's decision in *Chicago Mercantile Exchange* v. *Deaktor*, *supra*. With respect to an amendment providing discretionary review by the Commission of disciplinary actions brought by exchanges against their members, the Committee noted that "[w]hile as a matter of primary administrative jurisdiction, courts may defer to any review afforded by the Commission, the availability of such review procedure will not affect rights that are otherwise available to persons adversely affected by exchange action." Similarly, the Senate Committee had concluded that the disciplinary review provision did "not deny any person the right to seek relief in the courts." S. Rep. No. 93-1131, 93d Cong., 2d Sess. 8 (1974). See also H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 26 (1974) (letter from Department of Justice); *1974 Senate Hearings*, pt. 3, 724-725, 727-728 (statement of Jerome P. Weiss).

statute was enacted, including the historical and legal context, necessarily must be considered in ascertaining congressional intent. See, *e.g.*, *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 5, 8 n.7; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). In this case, Congress plainly understood that private rights of action had been recognized under the Act,[7] and the existence of those remedies was beyond question in 1974. Accordingly, unlike other implied private right of action cases that have been decided by this Court, this case does not involve the question whether Congress intended *to create* a private right of action. Instead, this case presents the question whether Congress intended *to abolish* a previously recognized private remedy when it extensively amended a statute but did not codify the private remedy.[8]

As the court of appeals recognized, it would amount to " 'judicial legislation' for a court to withdraw a remedy" that Congress understood to exist unless Congress plainly evidenced an intent that it should be withdrawn. See A. 150.[9] See also *Edmonds* v. *Compagnie General Transatlantique*, 443 U.S. 256, 273 (1979) ("[o]nce Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively

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[7] Because " 'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was' " (*Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 711, quoting *Brown* v. *GSA*, 425 U.S. 820, 828 (1976)), it is irrelevant that the cases upon which Congress relied might be decided differently today.

[8] That Congress had no reason to attempt to codify these rights in 1974 is obvious both from the unanimity of the decisional law (see pages 8–10, *supra*) and from the uniform statement of the existing law that was presented by industry representatives during congressional consideration of the 1974 amendments (see pages 11–12, *supra*).

[9] Affirmative proof of congressional intent to alter the existing law concerning private remedies may be required even when it is merely assumed that Congress knows of that precedent. Cf. *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 8 n.7; *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 475 (1959). In *Sierra Club* (slip op. 8 n.7), congressional silence was not accepted as altering the extant precedent holding that no federal remedy existed to contest obstructions of navigable rivers. In *T.I.M.E. Inc.* v. *United States*, *supra*, this Court did not find a private remedy, because the courts had not recognized that remedy under either the Motor Carriers Act of 1935 or the common law, and Congress had not enacted statutory amendments that would have altered the judicial precedent. 359 U.S. at 471–472, 475–476, 478.

alter the statute by causing it to reach different results than Congress envisioned"). Consistent with this rationale, "[t]his Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706 n.40.

This approach accords with settled principles of statutory construction. First, Congress is presumed in reenacting a statute to have approved existing judicial interpretations of the statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580–581 (1978); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951). In 1974, Congress knew, for example, that an implied private remedy had been recognized under Section 5a(8) of the Act, one of the provisions allegedly violated by the Exchange in this case (see pages 4, 9 & 11–12, *supra*), and when Congress amended that section, it continued the substantive requirement that contract markets enforce their rules. Compare 7 U.S.C. (1970 ed.) 7a(8) with 7 U.S.C. 7a(8). See also Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93–463, Section 407, 88 Stat. 1413–1414. Likewise, Congress increased the statutory penalties for violations of Section 9(b), which had previously been construed as granting a private right of action (see page 9, *supra*), but did not alter the substantive provisions of the section. Compare 7 U.S.C. (1970 ed.) 13(b) with 7 U.S.C. 13(b). It seems clear, therefore, that Congress implicitly approved these private rights of action.[10]

Moreover, Congress will not be found to have repealed a statutory right unless it expressly states its intention to do so, or an irreconcilable conflict exists between the earlier and the later enactment. See, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 189–190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549–551 (1974);

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[10] The Exchange apparently contends (Br. 40) that it is inappropriate to characterize Congress' action as a "reenactment" of the preexisting provisions because the full text of the prior statute was not reprinted in the Public Law. Because Congress completely reviewed the Act in 1974 and was familiar with the precedents permitting private rights of action under the statutory provisions, and because the full text of Sections 5a(8) and 9(b) were reprinted (as amended in 1974) in the House and Senate Committee Reports, that contention certainly elevates form over substance. See, H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 86, 105, 117 (1974); S. Rep. No. 93–1131, 93d Cong., 2d Sess. 53, 73, 85 (1974). See also 120 Cong. Rec. 34737–34750 (1974).

Posadas v. *National City Bank*, 296 U.S. 497, 503 (1936).[11] Congress did not expressly state its intention to close the door to private actions in 1974,[12] and there is no conflict between the previously established right to adjudication of private claims under the Act and the provisions of the 1974 amendments, which authorize Commission injunctive actions in federal district courts as well as administrative reparation proceedings. See 7 U.S.C. 13a–1, 18. By expressly authorizing government enforcement actions, Congress does not, of course, evidence its intent to deprive private parties of the right to sue. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706–707. Likewise, the reparation proceedings established by the 1974 amendments are consistent in principle with the previously recognized private rights of action inasmuch as they show that "Congress was [not] simply unwilling to impose any potential monetary liability to a private suitor." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 21. Indeed, Congress in 1974 provided that damages could be awarded in these proceedings to persons injured by a registered commodity professional's violation of "any provision" of the Act or the Commission's regulations. See 7 U.S.C. 18(a) and 18(e).

It is clear, however, that Congress did not view the reparations remedy as supplanting preexisting private rights of action

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[11] The policy underlying this principle was explained in *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842), in which the Court said: "The more natural, if not the necessary, inference * * * is, that the legislature intend the new laws to be auxiliary to, and in aid of the purposes of, the old law, even when some of the cases provided for may equally be within the reach of each." That principle applies with special force where, as here, the "new" law is an amendment to the "old law," rather than an apparently unrelated enactment.

[12] Congress' unexplained failure in 1974 to enact legislation authorizing *treble damage* awards does not evidence any general hostility to private damage actions. See A. 155 n.38, 162–163. Congress likewise failed to enact S. 2837, 93d Cong., 1st Sess. (1973), which would have replaced the Act with an entirely new statute, and would have included a provision (§ 505(a)) authorizing a "civil action for restitution" in cases of "non-willful" violations of the substantive provisions. Inasmuch as Congress rejected the idea of a new Statute (in favor of substantial amendment of the existing Act), and Congress was aware that private actions had been implied under the existing Act in any event, there is little significance in the fact that this proposal was not enacted.

for market manipulations.[13] Reparation proceedings were intended primarily for the adjudication of customer grievances against registered commodity professionals who act on behalf of members of the public in customer-broker relationships—futures commission merchants, associated persons, commodity trading advisors, commodity pool operators, and floor brokers.[14] Accordingly, Congress did not expressly authorize the bringing of reparation proceedings against either exchanges [15] or traders, such as the defendant "short" traders here, who manipulate commodity prices. See also A. 148–149.

In 1974, therefore, Congress was aware that private remedies had consistently been implied under the Act, and it neither expressed any disapproval of those remedies nor acted to curtail their availability.[16]

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[13] Shortly after the Act was amended in 1974, a leading commentator noted that, "[p]resumably, any injured person will continue to be able to sue in federal or state court on any available legal theory, such as breach of contract, violation of the Act, or common law fraud." Johnson, *The Perimeters of Regulatory Jurisdiction Under The Commodity Futures Trading Commission Act*, 25 Drake L. Rev. 61, 71 (1975) (footnote omitted).

[14] See 7 U.S.C. 6d, 6e, 6k, 6m and 18(a). See also H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 2-3, 22 (1974); S. Rep. No. 93-1131, 93d Cong., 2d Sess. 2, 5 (1975).

[15] Because Congress designed the reparations mechanism for resolving traders' claims against commodity professionals with whom they have direct dealings, it is not surprising that contract markets may not be the subject of reparation complaints. See Exchange Br. 18. Litigation involving contract markets is far more complex than the "small claims court" type grievance proceedings that Congress intended to take place with respect to reparations. See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 22 (1974); S. Rep. No. 95-850, 95th Cong., 2d Sess. 16 (1978).

[16] Contrary to the Exchange's contention (Br. 24), three special circumstances of the 1974 amendments make it appropriate to focus this inquiry into congressional intent on the Congress that enacted the 1974 amendments rather than on the Congress that originally enacted the substantive provisions allegedly violated in this case. First, as noted earlier, this case, unlike other private right of action cases decided by this Court, involves not whether Congress affirmatively intended to create a private remedy, but rather whether it intended to abrogate a remedy uniformly held to exist. Second, the language and structure of the Act, which this Court has recognized may provide sufficient evidence of congressional intent to recognize a private remedy (*Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 18), is the result of the Act's complete overhaul in 1974. Third, in 1974

II. Congress in 1974 Affirmatively Demonstrated its Intent That Private Rights of Action Continue To Be Available Under the Act

As we have shown (see pages 10–12, *supra*), in contrast to typical implied right of action cases,[17] Congress was not silent in 1974 with respect to private rights of action under the Act. Moreover, certain provisions enacted in 1974 reflect Congress' understanding that private rights of action existed and would continue to be available under the Act. Congress' design for these provisions will be seriously undermined if private rights of action are not permitted to continue. Accordingly, even if it is necessary to show that Congress affirmatively intended in 1974 to continue this form of private remedy, that burden can be satisfied here.

A. THE EXCLUSIVE JURISDICTION PROVISION AND THE JUDICIAL SAVINGS CLAUSE IN SECTION 2(a)(1) OF THE ACT ARE PREDICATED UPON THE CONTINUED EXISTENCE OF PRIVATE RIGHTS OF ACTION

In 1974, the Commission was granted "exclusive jurisdiction with respect to accounts, agreements * * *, and transactions involving" futures contracts. Section 2(a)(1) of the Act, 7 U.S.C. 2. This provision reflects two congressional objectives. First, the Commission was to be the sole government regulator

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Congress perceived enforcement of the Act to be inadequate and therefore authorized new government enforcement powers as well as certain types of private remedies. This Court has often relied on congressional intent concerning private rights of action by assessing that intent at the time meaningful government enforcement authority and express private remedies were enacted. See *e.g., Universities Research Ass'n, Inc.* v. *Coutu*, No. 78–1945 (Apr. 6, 1981), slip op. 20–22. We note in this regard that the Fifth Circuit, the only court of appeals to have ruled that a private right of action is unavailable under the Act, nonetheless agreed that "it is the intent of [the 1974] Congress and the legislative history of [the 1974] enactment that will form the basis of our decision here." *Rivers* v. *Rosenthal & Co.*, *supra*, 634 F. 2d at 783.

[17] See *Northwest Airlines* v. *Transport Workers Union of America, AFL–CIO*, No. 79–1056 (Apr. 20, 1981), slip op. 16, quoting *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 694.

of futures trading.[18] Second, principles of federal law developed under the Act and Commission regulations would "preempt the field insofar as futures regulation is concerned." See S. Conf. Rep. No. 93–1194, 93d Cong., 2d Sess. 35 (1974). Congress thus intended to avoid subjecting participants in futures trading to duplicative or conflicting legal requirements. See *id.* at 36; 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge); *id.* at 34736 (remarks of Rep. Poage); *id.* at 30459 (remarks of Sen. Talmadge). At the same time, however, Congress also made clear that the jurisdiction of the courts to adjudicate commodity claims would not be affected. Section 2(a)(1) of the Act, 7 U.S.C. 2, specifically provides that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." In light of Congress' awareness that the federal courts had previously and routinely upheld private actions under the Act, the broad language of this savings clause manifests Congress' intent to preserve this federal remedy. See Johnson, *The Perimeters of Regulatory Jurisdiction Under The Commodity Futures Trading Commission Act*, 25 Drake L. Rev. 61, 71 (1975). Indeed, a federal private right of action effectuates Congress' intent that the exclusive federal standards of the Act should govern activities involved in futures trading.

Petitioners attempt (Clayton Br. 39–42; Exchange Br. 22–23; Heinold Br. 43) to avoid the obvious meaning of the savings clause, however, by arguing that it was intended to preserve only private common law, commercial law, and antitrust actions, and not the private rights of action that had previously been recognized under the Act. This contention is plainly inconsistent with Congress' purposes in enacting the exclusive jurisdiction provision. In petitioners' view, for example, the only remedy available to a trader who has suffered monetary damage through the breach of a duty owed to him by a contract market would be a state court tort action. Congress made clear in 1974, however, that "where the * * * State courts retain jurisdiction, the Federal substantive law

[18] Section 2(a)(1) of the Act, 7 U.S.C. 2, provides that the jurisdiction of other state and federal agencies shall not be affected except insofar as the Commission's exclusive jurisdiction applies, but the Commission's exclusive jurisdiction clearly extends to the full range of activities involving futures contracts. See, *e.g.*, S. Conf. Rep. No. 93–1194, 93d Cong., 2d Sess. 35–36 (1974).

embodied in the * * * Act * * * would govern." 120 Cong. Rec. 30464 (1974) (remarks of Sen. Curtis).[19] In deciding whether any duty had been breached, therefore, the state court would have to determine, among other things, whether federal law (the Act and the Commission's regulations) imposed any duty upon the market, and whether the conduct alleged violated that duty. The congressional purpose underlying the exclusive jurisdiction provision would hardly be furthered if the judicial task of interpreting substantive federal law were left mainly to the state courts.[20] Indeed, this Court has previously declined "to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 19 n.8. That result would be even more anomalous here, given Congress' clearly expressed intention that federal law should govern, a factor that was not present in *Transamerica*.[21]

The Exchange also concedes (Br. 20) that the savings clause was intended to preserve antitrust claims. If there were any merit, however, to the Exchange's argument that Congress intended to immunize exchanges from private damage actions under the Act (and subject them only to penalties assessed by

[19] This does not mean that the exclusive jurisdiction provision expressly preempts the common law or state or federal non-regulatory statute of general applicability. Cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236–238 (1947). State common law principles of tort and contracts continue to apply in this area to the extent that those principles are applied in a manner consistent with the Act and the Commisson's regulations. See *P.J. Taggares Co.* v. *New York Mercantile Exchange*, 476 F. Supp. 72, 77–78 (S.D.N.Y. 1979). Cf. *United States* v. *Brien*, 617 F.2d 299, 300–310 (1st Cir.), cert. denied, 446 U.S. 919 (1980).

[20] If no federal private right of action existed, the federal courts would be required to adjudicate commodity issues raised by state law claims in diversity cases. 28 U.S.C. 1332. In such cases, federal court would have to determine how state courts would perceive federal substantive law in order to resolve common law commodity claims. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

[21] Amici curiae Ten United States Commodity Exchanges contend (Br. 28) that Congress desired uniform legal interpretations of the Act, as evidenced by the exclusive jurisdiction provision, and that private rights of action in federal courts would frustrate this goal. See also Exchange Br. 14. This Court has rejected similar arguments as "unsound." See *Pan American Petroleum Corp.* v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656, 664–665 (1961); *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290–291 (1922).

the Commission) because of a concern that the exchanges could be adversely affected by substantial damage awards,[22] it would be surprising indeed for Congress to have taken special care to preserve the threat of potentially greater treble damage liability for antitrust violations such as those alleged here (see A. 12–13).

The legislative history of the savings clause confirms that it was enacted to preserve, among other things, the availability of the federal courts to adjudicate private rights of action under the Act. The exclusive jurisdiction provision first appeared (without a savings clause) in H.R. 13113, 93d Cong., 2d Sess. § 201 (1974). After the House had passed H.R. 13113, Senator Clark explained to the Senate Committee on Agriculture and Forestry that the exclusive jurisdiction provision might be construed to eliminate private rights of action. Taking the view that private damage actions, and particularly treble damage actions, were a "most effective enforcement tool" (*1974 Senate Hearings*, pt. 1, 205), Senator Clark stated (*ibid.*):

> Unfortunately, the House bill not only does not authorize them, but section 201 of that bill [the exclusive jurisdiction provision] may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate.

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[22] The Exchange grounds this argument on the fact that Congress has required the Commission to take into account the financial condition of an exchange when imposing penalties. See 7 U.S.C. 13a. This provision does not evidence special concern for contract markets, however, because the Commission must make a similar determination before it assesses a monetary penalty against anyone. See 7 U.S.C. 9a. The Exchange also relies (Br. 18–19) on the state enforcement provisions enacted in 1978 as support for its view that Congress intended to eliminate private damage actions against contract markets. The Exchange's reliance upon these provisions is similarly misplaced because Congress authorized state enforcement proceedings in 1978 to supplement Commission efforts to combat fraudulent conduct occurring in *off-exchange* transactions. See 7 U.S.C. (Supp. III) 13a–2; S. Rep. No. 95–850, 95th Cong., 2d Sess. 25–26 (1978); H.R. Rep. No. 95–1181, 95th Cong., 2d Sess. 15–16 (1978). Even if this subsequent legislative enactment has any relevance here, its exclusion of contract markets from state enforcement suits does not suggest that Congress intended that exchanges should henceforth be immune from private damage suits. See A. 164–169. See also *Smith* v. *Groover*, 468 F. Supp. 105, 117–118 (N.D. Ill. 1979).

Other officials also expressed concern that the exclusive jurisdiction provision might be interpreted to deprive federal and state courts of jurisdiction over commodity-related matters generally, and over antitrust, common law, and commercial actions in particular. See e.g., *1974 Senate Hearings*, pt. 1, at 260 (statement of Rep. Rodino), *id.* at pt. 3, 663 (statement of Deputy Assistant Attorney General Clearwaters). Senator Talmadge, the Committee chairman, responded to these concerns (*id.* at pt. 3, 664 (emphasis added)):

> I doubt that this committee, and I doubt the House had in mind depriving either Federal courts or [*sic*] jurisdictions in antitrust matters, or *any other matter*, and certainly not State courts.

Senator Talmadge also suggested that the Department of Justice assist the Committee in drafting appropriate language for insertion in the House bill. *Ibid.* On the following day, Professor Roy A. Schotland of the Georgetown University Law Center urged that the committee include "explicit language in the statute that Federal and State courts are still open if a complainant prefers to go trial there" rather than bring reparation proceedings before the Commission. *Id.* at pt. 3, 737.

The Committee thereafter amended its version of H.R. 13113 by adding to Section 2(a)(1) the judicial savings clause that was ultimately enacted. See. S. Rep. No. 93–1131, 93d Cong., 2d Sess. 54 (1974). The Committee explained (*id.* at 6) that the savings clause would "make clear" that while "the Commission's jurisdiction, where applicable, supersedes State as well as Federal agencies; * * * Federal and State courts retain their jurisdiction." In apparent reference to Professor Schotland's concern about the reparation provisions to be enacted in Section 14 of the Act, the committee stated (*id.* at 23; emphasis added) that the broad savings clause was intended "to make clear that *nothing in the Act* should be construed as superseding or limiting jurisdiction of Federal and State courts." Indeed, Senator Talmadge explained that under the Senate bill (120 Cong. Rec. 30459 (1974)):

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spec-

trum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. [23]

The Conference Committee adopted the Senate Committee's savings clause as well as its interpretation that "nothing in the Act" affected "presently conferred" judicial jurisdiction. See S. Conf. Rep. No. 93–1194. 93d Cong., 2d Sess. 35 (1974). See also 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge); *id.* at 34737 (remarks of Rep. Poage).

B. IN ENACTING SECTIONS 5a(12) AND 8a(7) OF THE ACT, CONGRESS ENSURED THAT CONTRACT MARKETS WOULD CONTINUE TO BE SUBJECT TO PRIVATE DAMAGE ACTIONS FOR FAILING TO DISCHARGE THEIR SELF-REGULATORY DUTIES

Congress was aware in 1974 that the lower federal courts had recognized an implied private right of action for damages against contract markets for failing to enforce their rules as required by Section 5a(8) of the Act, 7 U.S.C. (1970 ed.) 7a(8). See pages 8–12, *supra*. Congress also knew that some contract markets had attempted to avoid such litigation by "pruning out" certain rules that they believed to be difficult to enforce. See 119 Cong. Rec. 41333 (1973). See also H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 46 (1974). In addition, Congress perceived that the government was hampered in its efforts to curtail the contract markets' abdication of their responsibilities because of the "limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act" (*ibid.*). Thus, at a time when Congress believed exchange self-regulation to be inadequate generally, Congress found that the self-regulatory efforts of the exchanges were becoming progressively more limited.

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[23] Senator Talmadge also expressed the hope (120 Cong. Rec. 30459 (1974)) that the Commission's broad adjudicatory authority would "somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved." Senator Talmadge certainly was not suggesting that the savings clause merely preserved appellate jurisdiction over administrative adjudications, which had been expressly authorized prior to 1974 and was also expressly provided for in the Act as amended in 1974. See 7 U.S.C. (1970 ed.) 9, 13a, and 13b; 7 U.S.C. 9, 13a, 13b, and 18(g).

The exchanges suggested that this problem would be solved if they were granted at least partial immunity from private damage actions. See pages 11–12, *supra*. The implicit premise of their proposal was that a grant of immunity would encourage them to adopt a broad spectrum of rigorous rules because they would then have no fear of incurring liability for failing to enforce any rule that might prove difficult to enforce. Another possible solution, of course, was to limit the duty imposed on contract markets by Section 5a(8) of the Act. If either of these approaches had been adopted by Congress, an intention to eliminate private damage actions against exchanges might well be inferred. See Exchange Br. 34. However, Congress did not adopt either approach.

Congress instead enacted two new provisions, Sections 5a(12) and 8a(7) of the Act, 7 U.S.C. 7a(12) and 12a(7), which granted to the Commission a pervasive oversight authority with respect to exchange rules (see H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 46, 48 (1974)). Section 5a(12) requires that the exchanges submit virtually all substantive rules and rule changes to the Commission, which must approve them before they may take effect. 7 U.S.C. 7a(12). See also 17 C.F.R. 1.41. Likewise, Section 8a(7) authorizes the Commission to alter or supplement exchange rules so as to maintain or expand the degree of self-regulation necessary to protect traders in the market. 7 U.S.C. 12a(7).[24] Congress thus recognized that there was great force to the premise underlying the exchanges' argument in favor of immunity: if the exchanges continued to have relatively unbridled authority to "prune out" rules, and if they could limit their potential liability in private actions by "pruning out" rules that might prove difficult to enforce, they would have a strong incentive to do so—in contravention of one of the major policy judgments of the Act. Although Congress found this premise unassailable, it rejected the exchanges' conclusion that they should therefore be granted immunity. In-

[24] These provisions were described by Representative Thone as remedying the "perverse effect" on self-regulation of implied private rights of action under Section 5a(8) of the Act. 120 Cong. Rec. 10748 (1974). See also *id.* at 10736–10737 (remarks of Rep. Poage); H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 46, 48 (1974). Likewise, Senator Talmadge suggested that these provisions would grant the Commission "the tools to require that the exchanges perform their regulatory functions better." 120 Cong. Rec. 30462 (1974).

stead, Congress empowered the Commission to choose which rules contract markets may now "prune out" or be required to enforce, thus demonstrating its intention to continue the threat of private suits under Section 5a(8) as a spur to the exchanges to provide ample protection to traders.[25]

C. THE EVIDENCE OF CONGRESSIONAL INTENT TO PRESERVE PRIVATE RIGHTS OF ACTION UNDER THE ACT IS FAR MORE COMPELLING THAN THAT WHICH THIS COURT FOUND SUFFICIENT TO CREATE A PRIVATE REMEDY IN *CANNON*

In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court held that a private right of action was available under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Although Title IX did not expressly provide a private remedy, the Court concluded that the relevant legislative history "rather plainly indicates that Congress intended to create * * * a [private] remedy" (441 U.S. at 694). The Court found particularly persuasive the fact that Congress had patterned Title IX of the Education Amendments after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, under which a private right of action had previously been implied by one court of appeals and four district courts (441 U.S. at 696 & nn.20, 21). The Court concluded that it was both "appropriate" and "realistic to presume that Congress was thoroughly familiar with" these decisions, and that it "expected its enactment to be interpreted in conformity with them" (*id.* at 699). The Court stated that (*id.* at 702–703; footnotes omitted):

> [T]he very persistence—before 1972 and since, among judges and executive officials, as well as among litigants

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[25] The contention of amici curiae Ten United States Commodity Exchanges (Br 28–30) that the self-regulatory efforts of the contract markets will be frustrated by the continued recognition of private suits under Section 5a(8) is an argument that should properly be addressed to Congress—as it was, unsuccessfully, in 1974. At all events, we believe that this contention lacks merit because the practical effect on contract markets of private suits will largely depend on the particular standards to be applied in determining liability, an issue that remains to be resolved by the lower federal courts. Although the question is not presented here, the Commission believes that the interests of all parties will be protected if contract markets are held to be liable under Section 5a(8) only if they deliberately fail to enforce their rules or fail to do so because of gross negligence.

> and their counsel, and even implicit in decisions of this Court—of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms, that assumption.

The evidence here—that Congress knew in 1974 that private rights of action had consistently been implied under the Commodity Exchange Act and expected that those rights would continue to be available—is even more persuasive than the evidence upon which the Court relied in *Cannon*. Congress was specifically advised by representatives of the commodity industry that private rights of action were available under the Act; Congress referred to those rights of action during its deliberations; it premised portions of its regulatory reforms on those private rights of action; and, finally, in Section 2(a)(1), Congress expressly preserved the jurisdiction of the courts to entertain these actions.[26] Moreover, at that time Congress still "tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 718 (Rehnquist, J., concurring) (emphasis in original). Indeed, "[c]ases such as *J.I. Case Co.* v. *Borak*, [377 U.S. 426 (1964),] and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task" (441 U.S. at 718). As the Court has recognized, "[i]t was *after* 1972 that this Court decided *Cort v. Ash* and * * * other cases" establishing the "strict approach followed in our recent cases" (*id.* at 698 (emphasis in original)). See also *id.* at 698 n.23. It was also only after 1974

[26] To be sure, the explicit "right creating" language that the Court also relied on in *Cannon* (see 441 U.S. at 690–693 n.13) is not present here. However, as the court of appeals recognized (A. 160), while "the form in which Congress casts a statutory provision may serve as some indicator of the propriety of implication * * * this is by no means determinative. When, as here, the legislative history and the 'circumstances of [a statute's] enactment' evince a clear intent to preserve a private cause of action, the form in which this intent is expressed cannot be permitted to become an obstacle to its realization."

that this new judicial approach crystallized.[27] Accordingly, it is in light of the legal context existing in 1974 that the intent of Congress must be ascertained here.

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[27] There is no merit to the contention (see Exchange Br. 23) that traders who are "speculators" are not within the special class of persons for whose benefit Congress enacted the Act, and that they therefore fail to meet the first prong of the test articulated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). See A. 129–137. Congress has continually acknowledged that "thousands of speculative traders, representing almost every line of human endeavor," participate in futures trading. See H.R. Rep. No. 743, 90th Cong., 1st Sess. 2 (1967); 80 Cong. Rec. 8289–8293 (1936). These "speculators" are necessary to the proper functioning of a futures market because they assume the risk that "hedgers" seek to avoid, and thereby provide the market liquidity necessary to ensure that the price of a futures contract accurately reflects forces of supply and demand. The congressional purpose set forth in the Act recognizes that the markets would cease to attract the participation of such traders, and therefore fail to serve the national interest in these markets, if effective curbs on manipulation and other market disturbances did not exist. 7 U.S.C. 5. To accomplish its goal, Congress has prohibited manipulation (7 U.S.C. 9, 13(b) and 13b), and it has imposed on contract markets a duty to prevent manipulation as a condition of doing business (7 U.S.C. 7(d). Similarly, contract markets are required (7 U.S.C. 7a(8) and 12a(7)) to enforce their rules governing trading, which protect all traders, whether members of "the public generally" or "persons engaged in the business of buying and selling [a] commodity" (7 U.S.C. 5). See also Grain Futures Act of 1922, ch. 369, 42 Stat. 999.

The suggestion that Congress enacted these provisions for the special benefit only of hedgers and consumers of commodities would require the conclusion that Congress would have intended only those persons to have a private right of action in the case of manipulation. There is no evidence that Congress ever has had such a limited intent. Indeed, in 1974, Congress reaffirmed its intent to protect "speculators" from manipulated markets. It was recognized that "[e]veryone who uses the commodity futures market deserves" to be "adequately protected from any price fluctuations brought about by manipulation of the commodity futures market." 120 Cong. Rec. 30466 (1974) (remarks of Sen. Cranston). Thus, Congress intended that "the integrity and adequacy of futures markets be assured to all parties." *Id.* at 30458 (1974) (remarks of Sen. Talmadge). See also *id.* at 34999 (remarks of Sen. Clark); *id.* at 35000 (remarks of Sen. Humphrey); *id.* at 30467 (remarks of Sen. Taft); *id.* at 10739 (remarks of Rep. Mayne); id. at 10740 (remarks of Rep. Brown); *id.* at 10742 (remarks of Rep. Sebelius).

The court of appeals also found, of course, that the remaining prongs of the *Cort* test were satisfied, and we agree with the court's discussion of those issues. See A. 126–170.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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October Term, 1980

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—against—

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Respondents.

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—against—

NATIONAL SUPER SPUDS, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC.

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MOTION OF NEW YORK STOCK EXCHANGE, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

New York Stock Exchange, Inc. (the "Exchange") moves pursuant to Rule 42 of the rules of this Court for leave to file the attached brief *amicus curiae* in support of the position of petitioner New York Mercantile Exchange that the decision below should be reversed because the majority erred in implying a private right of action for damages against commodities exchanges under Sections

5(d), 5a(8) and 9(b) of the Commodity Exchange Act ("CEA").

The Exchange is, and has been since October 1, 1934, registered with the Securities and Exchange Commission as a national securities exchange pursuant to Section 6 of the Securities Exchange Act of 1934 (the "Exchange Act"). The Exchange is the nation's largest securities exchange.

The Exchange Act and the CEA provide for comprehensive regulatory schemes under which private self-regulatory organizations function under the supervision of independent regulatory agencies. Neither the Exchange Act nor the CEA provides for private damage actions against exchanges. Both statutes were extensively amended in recent years—the Exchange Act in 1975 and the CEA in 1974—but no provision was added to either act authorizing private damage actions against exchanges. The legislative histories of both acts and their recent amendments provide no indication that Congress intended that there be private damage actions against exchanges. Nevertheless, some lower courts have implied, and continue to imply, private damage actions against exchanges on the basis of Congress' presumed intent while amending the statutes to adopt *sub silentio* the holdings of lower court cases then extant.

In its decision, the majority below relied on *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), which is the fountainhead for the theory that a private right of action against an exchange may be judicially implied under Section 6 of the Exchange Act. This Court, however, has never reviewed a decision implying a private right of action against an exchange under the Exchange Act or the CEA. Resolution of this issue will be important in determining the extent to which regulation of exchanges will be committed to the agencies charged by Congress with that responsibility or will be left to the vicissitudes of lower courts and juries. These cases also will determine whether *de novo* review of important ques-

tions as to the existence of implied private rights of action is foreclosed by lower court decisions followed by congressional silence when the statute is amended.

The Exchange is a defendant in two separate cases which present the question whether a private right of action for damages against a national securities exchange may be implied under Section 6 of the Exchange Act. *Rich v. New York Stock Exchange, Inc.*, Civil Action No. 73-4642 (PNL) (S.D.N.Y.); *Walck v. American Stock Exchange, Inc.*, Civil Action No. 77-140 (E.D. Pa) In the *Rich* case, the district court has denied a motion by the Exchange for judgment on the pleadings. *Rich v. New York Stock Exchange, Inc.*, [Current] Fed.Sec.L.Rep. (CCH) ¶ 97,856 (S.D.N.Y. Feb. 3, 1981). The Exchange argued in its motion that a private right of action may not be judicially implied under Section 6 of the Exchange Act. Upon consent of the parties, all proceedings in the *Rich* case have been stayed pending this Court's decision in the instant cases.

The Exchange has been unable to obtain the consent of all the parties to the filing of this brief *amicus curiae*. The Exchange therefore requests the Court's leave to file the attached brief *amicus curiae*.

Dated: April 9, 1981

Respectfully submitted,

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NATIONAL SUPER SPUDS, INC., *et al.*,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC.

INTEREST OF NEW YORK STOCK EXCHANGE, INC.

New York Stock Exchange, Inc. (the "Exchange") is a national securities exchange registered with the Securities and Exchange Commission pursuant to Section 6 of the Se-

curities Exchange Act of 1934* (the "Exchange Act"). The Exchange is a New York not-for-profit corporation. It has 1,366 members, most of whom are associated with one of the Exchange's 564 member organizations. As a self-regulatory organization under the Exchange Act, the Exchange is charged with supervisory and enforcement responsibilities over its members and member organizations, including their approximately 48,500 registered persons and 130,000 other employees. In carrying out its supervisory and enforcement responsibilities, the Exchange monitors approximately 80 per cent of all exchange-traded securities transactions in the United States.

The decision below** recognized the close similarities between the Exchange Act and the Commodity Exchange Act ("CEA"), including the corresponding roles played by petitioner New York Mercantile Exchange (the "NYME") and the Exchange. Both the Exchange Act and the CEA adopt a licensing procedure for the registration of exchanges (designated national securities exchanges and contract markets, respectively) upon the fulfillment of specified conditions. (Exchange Act § 6(b); CEA § 5(a)-(d)) Among these conditions are the requirements that exchanges enforce their rules (Exchange Act § 6(b)(1); CEA § 5a(8)), and that such rules provide for the prevention of fraudulent and manipulative practices. (Exchange Act § 6(b)(5); CEA § 5(d)) The Exchange Act and the CEA require the registration of traders (broker-dealers and futures commission merchants, respectively). (Exchange Act § 15; CEA § 4f) Both acts establish independent regulatory commissions (the SEC and the CFTC, respectively) with substantial powers of oversight of ex-

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* For the Court's convenience, Sections 6 and 19 of the Exchange Act as enacted in 1934 and as amended by the Securities Acts Amendments of 1975 are reproduced in the statutory appendix to this brief, *infra*.

** 638 F.2d 283.

changes (Exchange Act § 4(a); CEA § 2(a)(2)), including the power to approve or to disapprove exchange rules (Exchange Act § 19(b)*; CEA § 5a(12)), and the power to suspend or to revoke the license of an exchange. (Exchange Act § 19(h); CEA § 5(b)) The Exchange Act and the CEA expressly provide that the SEC and the CFTC may seek injunctive relief for violations of the statute. (Exchange Act § 21; CEA § 6(b)) Under both the Exchange Act and the CEA, judicial review of all orders of the SEC and the CFTC is lodged exclusively in the circuit courts of appeals. (Exchange Act § 25; CEA § 6(a), (b)) Both the Exchange Act and the CEA provide criminal penalties for price manipulation and for other statutory violations. (Exchange Act § 32; CEA § 9(b)) Finally, both statutes provide express, though limited, private civil remedies to persons aggrieved by particular statutory violations. (Exchange Act §§ 9, 16, 18, 29(b);** CEA § 14).

In *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), the Court of Appeals for the Second Circuit held that a private right of action for damages may be implied against a national securities exchange for the exchange's alleged breach of duty under Section 6. *Baird* is cited by the majority below as a case of "special importance," which foreshadowed similar decisions under the CEA, because in *Baird* "the claim was of failure of the New York Stock Exchange to perform its duties—a claim paralleling that asserted here against NYME." 638 F.2d at 297.

Although a number of lower courts have followed *Baird*, this Court has never reviewed *Baird's* holding. The Ex-

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* See the statutory appendix to this brief for the text of Section 19 of the Exchange Act as enacted in 1934 and as amended by the Securities Acts Amendments of 1975.

** The Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa *et seq.*, provides additional investor protection when a broker-dealer is liquidated under the provisions of the Act.

change Act, and in particular Section 6, was extensively amended in 1975; however, Congress did not amend Section 6 to afford an express private right of action against exchanges nor did Congress, in the legislative history of the 1975 amendments, acknowledge the *Baird* holding or that any courts had legislated a private right of action under Section 6.

More recently, following this Court's decisions in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), two lower courts have questioned whether a private right of action may be implied under Section 6 of the Exchange Act. *Verace v. New York Stock Exchange, Inc.*, 478 F. Supp. 1061 (S.D.N.Y. 1979); *Lenowitz v. Philadelphia Stock Exchange, Inc.*, 502 F. Supp. 428 (E.D. Pa. 1980). One lower court, however, noting the relative longevity of the *Baird* holding and citing this Court's eventual acquiescence (after 25 years) in the substantial and unanimous lower court treatment of Exchange Act § 10(b), and further persuaded by the rationale of the court below, has held that a private right of action may be implied against the Exchange under Section 6 of the Exchange Act. *Rich v. New York Stock Exchange, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,856 (S.D.N.Y. Feb. 3, 1981).

The Exchange necessarily is interested in this case because of the close parallels between the statutory schemes governing the Exchange and the NYME and the similarities between the arguments advanced to sustain a judicially-created damage action under each statutory scheme. The Court's decision in this case will have a significant impact upon the regulatory framework in which exchanges operate. It will also determine the extent to which lower court decisions that are clearly contrary to holdings of this Court are foreclosed from re-examination by reason of congressional silence at the time of enactment of subsequent statutory amendments.

SUMMARY OF ARGUMENT

The majority decision of the court of appeals erroneously held, *inter alia*, that a private right of action for damages against a commodities exchange may be implied under Sections 5(d), 5a(8), and 9(b) of the CEA. The majority's rationale—that pre-1974 lower court decisions implying private rights of action under the Exchange Act and the CEA, even though incorrectly decided and never reviewed by this Court, are controlling in determining congressional intent with respect to the 1974 CEA amendments—is contrary to recent decisions of this Court and is unsound. The decision of the majority runs counter to the unitary scheme of supervised self-regulation which Congress intended and which this Court has recognized under the Exchange Act and the CEA.

ARGUMENT

I.

The Court Below Erred In Implying A Private Right Of Action Under The CEA Based Upon The Presumption That Congress, In Amending The CEA In 1974, Was Aware Of And Intended To Adopt *Sub Silentio* Lower Court Decisions Implying Such A Private Right Of Action.

The majority of the court below stated the relevant issue to be whether Congress, when it amended the CEA in 1974, "intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act." *Leist v. Simplot,* 638 F.2d 283, 303 (2d Cir. 1980). Noting the existence of pre-1974 lower court decisions implying private rights of action under the CEA and the Exchange Act, and presuming that Congress was aware of these decisions and intended to adopt *sub silentio* their holdings, the majority concluded:

> The burden thus lies on those who urge that the 1974 amendments demonstrate an intention to change prior law . . . . When a principle has become settled through court decisions, there is no occasion for Congress to speak unless it wishes a change.

Id.

The majority's reasoning is seriously flawed. First, the majority practically ignored the language of the CEA, which should have been the starting point of its analysis. Second, the majority's presumption of congressional intent as a technique of statutory construction is inconsistent with this Court's recent decisions. Third, the pre-1974 lower court decisions implying private rights of action under the CEA and the Exchange Act, heavily relied upon by the majority, were incorrectly decided, and were never reviewed or otherwise affirmatively acknowledged by this Court. Furthermore, those lower court decisions were

not judicial interpretations of the Exchange Act and the CEA, but were judicial legislation creating tort actions to provide remedies perceived as necessary by some judges but not by Congress.

A. The Relevant Language Of The CEA Does Not Support Implication Of A Private Right Of Action.

This Court has repeatedly emphasized that the question whether a private right of action should be implied is solely a matter of congressional intent, and that to determine congressional intent analysis must begin with the language of the statute. *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975); *Touche Ross & Co. v. Redington*, 422 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). However, the majority below fails even to quote the relevant statutory provisions governing commodities exchanges, stating that the "form" of the statute should not be an "obstacle" to the realization of Congress' presumed intent. 638 F.2d at 317.

The majority below held that a private right of action against commodities exchanges may be implied under Sections 5(d), 5a(8), and 9(b) of the CEA. Sections 5(d) and 5a(8), however, are essentially licensing statutes. These provisions merely require, as a condition of an exchange's designation as a "contract market," that the exchange provide for "the prevention of manipulation of prices and the cornering of any commodity" and that the exchange "[e]nforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof . . . ." Sections 5(d) and 5a(8) of the CEA, like Section 17(a) of the Exchange Act considered in *Redington*, grant "no private rights to any identifiable class and [proscribe] no conduct as unlawful." 442 U.S. at 575-76.

Similarly, Section 9(b) of the CEA, like the statute this Court considered in *Cort v. Ash, supra*, is a bare criminal statute. Section 9(b) does not expressly provide

for any civil liability; rather it merely provides that it shall be a felony punishable by fine or imprisonment or both "for any person to manipulate . . . the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market or to corner . . . any such commodity." Like the statutory provisions this Court considered in *Redington, Transamerica,* and *Kissinger,* Section 9(b) merely "proscribes certain conduct" and does not "create or alter any civil liabilities." *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. at 19. Moreover, as Judge Mansfield's dissent below succinctly stated,

> [Section] 9(b) . . . does not disclose any desire to benefit a special class of which plaintiffs are members. When read in light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors. . . . [T]here is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages.

638 F.2d at 337-38.

B. The Majority's Construction Of The CEA, Premised On Congressional Silence, Was Improper.

The majority below reasoned that because Congress must have been aware of *Baird* and other lower court cases implying private rights against exchanges under the Exchange Act and the CEA, Congress in the 1974 CEA amendment process must be presumed to have considered the express grant of such a private right to be unnecessary. Such reasoning has been previously rejected by this Court. In *T.I.M.E. Inc. v. United States,* 359 U.S. 464 (1959), for example, the Court dismissed the argument that it should uphold a private right of action as the will of Congress

because of claimed congressional awareness of the private right and subsequent congressional inaction:

> We are told that Congress has long been aware that the Commission was of the view that a common-law action for recovery of unreasonable rates paid to a motor carrier, with referral to the Commission of the issue of unreasonableness, would lie, and that its failure to legislate in derogation of this view implies an approval and acceptance of it. But it appears that each time the Commission's views in this regard were communicated to committees of Congress, it was in connection with a request by the Commission for legislation which would have given to shippers a cause of action under the statute and granted to the Commission the authority to award reparations, and each time that request was rejected. . . . [W]e do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.

359 U.S. at 477-78. Similarly, this Court in *SEC v. Sloan*, 436 U.S. 103, 121 (1978), declined to impute to Congress acceptance of a supposedly long-standing administrative interpretation, noting that "we are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents."

C. The Lower Court Decisions Relied Upon By The Majority Do Not Sustain The Decision Below.

The majority relies upon pre-1974 lower court decisions purportedly interpreting the statutes to provide implied private rights of action against exchanges under the Exchange Act and the CEA. An examination of these decisions, however, demonstrates that the lower courts were not

interpreting the statutes but were supplementing them with judicially-created tort claims.

This is illustrated by the decision of the Court of Appeals for the Second Circuit in *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944). The majority opinion in *Baird* was written by Judge Augustus N. Hand. The majority, without analysis, held that the Exchange breached a duty by failing to take disciplinary action against a delinquent member-broker, but affirmed dismissal by the district court on the ground that the Exchange's breach of duty did not cause the plantiff's alleged damages. 141 F.2d at 239. In Judge Clark's separate opinion (dissenting on the issue of causation), which frequently is cited as expressing the rationale for the *Baird* decision, he articulated classic tort theory to imply a cause of action against the Exchange under Section 6 of the Exchange Act. 141 F.2d at 240-45. The majority below cited Judge Clark's opinion to support its conclusion that a private right of action may be implied against commodities exchanges under the CEA. 638 F.2d at 296-98.

Baird is irreconcilable with this Court's decisions in *Cort*, *Redington*, and *Transamerica*. *Baird* exemplifies a process, not of statutory construction, but of judicial legislation which has been expressly rejected by this Court.

Judge Clark said in *Baird*, relying upon tort rationale: "It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none." 141 F.2d at 245. This Court in *Touche Ross & Co. v. Redington*, *supra*, expressly rejected this tort rationale in the following terms: "As we recently have emphasized, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private right of action in favor of that person.'" 442 U.S. at 568, *quoting Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979).

Judge Clark in *Baird* also invoked the "necessity" for implying a private remedy. Otherwise, he said the legislation would be little more than "a snare and a delusion." 141 F.2d at 245. This Court in *Redington* rejected the "necessity" argument as irrelevant. The question is solely one of legislative intent where, as here, "the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful." 442 U.S. at 576.

Judge Clark in *Baird* further relied on statutory "purpose." He noted that the Exchange Act contained thirty-seven references to protecting the public. 141 F.2d 244 n.4. Judge Clark observed: "[I]f the investing public is to be completely and effectively protected, § 6(b) must be construed as granting to injured investors individual causes of action to enforce the statutory duties imposed upon the exchanges." 141 F.2d at 244-45. This Court in *Redington* rejected this "remedial purposes" contention. The Court stated: "[G]eneralized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit . . . .'" 442 U.S. at 578, *quoting SEC v. Sloan*, 436 U.S. 103, 116 (1978). Moreover, this Court expressly declined to read *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), "so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action." 442 U.S. at 577.

Judge Clark in *Baird* declined to follow the established principle of statutory construction *"expressio unius est exclusio alterius."* 141 F.2d at 245. The Court in *Redington* adhered to this maxim. This Court stated: "[W]hen Congress wished to provide a private damages remedy [under the Exchange Act], it knew how to do so and did so expressly." 442 U.S. at 572.

Finally, Judge Clark in *Baird* did not examine statutory language or history for positive indications of legislative intent. This Court in *Redington* reaffirmed that affirmative

legislative intent is the fundamental basis upon which a private right of action is to be implied, and cautioned that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." 442 U.S. at 571.

Baird and similar lower court decisions relied upon by the majority below are not authoritative statutory interpretations that should be presumed to have the sanction of Congress. Those decisions are based not upon the statute but upon a judicially perceived need to create a remedy for every wrong. The canon of construction cited by the majority below—that the reenactment of a statute incorporates preceding judicial interpretations—is inapplicable. The pre-1974 lower court decisions have no precedential value because the rationale that underlies them was erroneous and has been expressly rejected by this Court.

In the instant cases, given the absence of express statutory language or affirmative legislative history, and given the discredited rationale of the lower court cases relied upon by the majority below, this Court should reject the majority's effort to usurp the legislative process.

II

Implication Of A Private Right Of Action Against Exchanges Is Inconsistent With The Scheme Of Supervised Self-Regulation Which Congress Intended Under Both The Exchange Act And The CEA.

Both the Exchange Act and the CEA embody Congress' intent to establish and to promote a unified framework for control of securities exchanges and commodities exchanges by the SEC and the CFTC, respectively. See comparison of the Exchange Act and the CEA, *supra* at 2-3. District courts should not be permitted to interfere with the duties and liabilities of exchanges under these complex regulatory schemes. Congress has established specialized regulatory

agencies with express powers to define and to enforce exchanges' duties and liabilities, *cf. Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952), and has prescribed that judicial review should take place only after agency action, and then in the courts of appeals.

In *Silver v. New York Stock Exchange*, 373 U.S. 341, 352 (1963), this Court recognized that under the Exchange Act

> [t]he pattern of governmental entry . . . was by no means one of total displacement of the exchanges' traditional process of self-regulation. The intention was rather, as MR. JUSTICE DOUGLAS said, while Chairman of the S.E.C., one of "letting the exchanges take the leadership with Government [SEC] playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." Douglas, Democracy and Finance (Allen ed. 1940), 82.

See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127-28 (1973); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 663-67 (1975). The regulatory scheme established under the CEA is similar. *See Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 290-304 (1973); *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) *(per curiam)*.

Both the Exchange Act and the CEA were extensively amended in the mid-1970's. The purpose of these amendments was to ***strengthen*** governmental oversight of the exchange markets, but not, as the majority of the court below suggests (638 F.2d at 309), to replace or to eliminate the general concept of supervised self-regulation. In fact, the 1975 amendments to the Exchange Act (in particular, the amendments to Sections 6 and 19) and the 1974 amendments to the CEA (in particular CEA §§ 5a and 8a) expressly

retained the scheme of supervised self-regulation. The only significance of the recent amendments to the instant cases is that they demonstrate Congress' intent to make exchanges more accountable to the SEC and the CFTC rather than to private damage claimants in the district courts.

Implied private rights of action against exchanges are inconsistent with the comprehensive scheme of supervised self-regulation which Congress intended under both the Exchange Act and the CEA. Implied private rights of action against exchanges militate against uniformity of standards of exchange responsibility. Both the Exchange Act (Section 19(h)) and the CEA (Section 6(a)) expressly provide for SEC and CFTC oversight of exchange regulatory conduct. SEC and CFTC orders pursuant to this express authority are reviewable only in the courts of appeals. Implication of private rights of action against exchanges, superimposed on this existing statutory framework, effectively disperses the SEC's and the CFTC's oversight powers among the 91 district courts around the country. Inevitably, implication of such private rights of action results in differing judicial determinations as to standards of exchange responsibility, similar to the differing, judicially-created standards of broker-dealer responsibility which have evolved from private damage actions heretofore implied under Sections 7 and 10(b) of the Exchange Act, Section 17 of the Securities Act of 1933, Exchange Rules 405 and 431, and Regulation T of the Board of Governors of the Federal Reserve System.

Recently, in *Universities Research Association, Inc. v. Coutu*, No. 78-1945 (U.S. April 6, 1981), Mr. Justice Blackmun, speaking for a unanimous Court, rejected an attempt to imply a private right of action for damages under the Davis-Bacon Act on the ground, among others, that the unity and consistency intended to be established by the elaborate administrative scheme under the Act "would be short-lived if courts were free . . . to substitute [their] judgment for that of the contracting agency. . . ." That

analysis is equally applicable to the instant question whether private rights of action should be implied against exchanges.

Implication of private rights of action against exchanges interferes with the exchanges' regulatory functions under the Exchange Act and the CEA, and thereby frustrates "the underlying purpose of the legislative scheme." *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979). The prospect of facing huge, potentially unlimited, civil damage claims undoubtedly has an inhibiting effect on exchanges' regulatory actions. Surely, Congress did not intend that exchanges' vigorous enforcement of the Exchange Act and the CEA, and the many rules promulgated thereunder, should be compromised or diminished by the threat of potentially ruinous private damage claims.

CONCLUSION

The judgment of the court of appeals below should be reversed, and the tort theory of exchange liability espoused in *Baird* v. *Franklin, supra,* should be finally laid to rest.

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Respectfully submitted,

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STATUTORY APPENDIX

A-1

Section 6 of the Exchange Act, as Enacted in 1934

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

Section 19 of the Exchange Act, as Enacted in 1934

(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this title or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting businesses; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

(c) The Commission is authorized and directed to make a study and investigation of the rules of national securities exchanges with respect to the classification of members, the methods or election of officers and committees to insure a fair representation of the membership, and the suspension, expulsion, and disciplining of members of such exchanges. The Commission shall report to the Congress on or before January 3, 1935, the results of its investigation, together with its recommendations.

(d) The Commission is authorized and directed to make a study and investigation of the adequacy, for the protection of investors, of the rules of national securities exchanges and national securities associations, including rules for the expulsion, suspension, or disciplining of a member for conduct inconsistent with just and equitable principles of trade. The Commission shall report to the Congress on or before April 3, 1963, the results of its study and investigation, together with its recommendations, including such recommendations for legislation as it deems advisable. The Commission is authorized to appoint, without regard to the civil service laws, rules, and regulations, such personnel as the Commission deems advisable to carry out such study and investigation and to fix their respective rates of compensation without regard to the Classification Act of 1949, as amended, but no such rate shall exceed $18,500 per annum. To carry out such study and investigation there is hereby authorized to be appropriated the sum of $950,000.

(e)(1) The Commission is authorized and directed to make a study and investigation of the purchase, sale, and holding of securities by institutional investors of all types including, but not limited to, banks, insurance companies, mutual funds, employee pension and welfare funds, and foundation and college endowments, in order to determine the effect of such purchases, sales, and holdings upon (A) the maintenance of fair and orderly securities markets, (B) the stability of such markets, both in general and for individual securities, (C) the interests of the issuers of such securities, and (D) the interests of the public, in order that the Congress may determine what measures, if any, may be necessary and appropriate in the public interest and for the protection of investors. The Commission shall report to the Congress, on or before December 31, 1970, the results of its study and investigation, together with its recommendations, including such recommendations for legislation as it deems advisable.

(2) For the purposes of the study and investigation authorized by this subsection, the Commission shall have all the power and authority which it would have if such investigation were being conducted pursuant to section 21 of this Act. The Commission is authorized to appoint, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and to pay, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, such personnel as the Commission deems advisable to carry out the study and investigation authorized by this subsection, but no such rate shall exceed the per annum rate in effect for a GS-18.

(3) In connection with the study authorized by this subsection, the Commission shall consult with representatives of various classes of institutional investors, members of the securities industry, representatives of other Government agencies, and other interested persons. The Commission shall also consult with an advisory committee which it shall establish for the purpose of advising and consulting with the Commission on a regular basis on matters coming within the purview of such study.

(4) There is authorized to be appropriated not to exceed $945,000 for the study and investigation authorized by this subsection.

A-4

Section 6 of the Exchange Act, as Amended by the Securities Acts Amendments of 1975

(a) An exchange may be registered as a national securities exchange under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) An exchange shall not be registered as a national securities exchange unless the Commission determines that—

(1) Such exchange is so organized and has the capacity to be able to carry out the purposes of this title and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, and the rules of the exchange.

(2) Subject to the provisions of subsection (c) of this section, the rules of the exchange provide that any registered broker or dealer or natural person asssociated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof.

(3) The rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

(4) The rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

(5) The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.

(6) The rules of the exchange provide that (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of this title, the rules or regulations thereunder, or the rules of the exchange, by expulsion, suspension, limitation of activties, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(7) The rules of the exchange are in accordance with the provisions of subsection (d) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.

(8) The rules of the exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(c)(1) A national securities exchange shall deny membership to (A) any person, other than a natural person, which is not a registered broker or dealer or (B) any natural person who is not, or is not associated with, a registered broker or dealer.

(2) A national securities exchange may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection [of investors] shall, deny membership to any registered broker or dealer or natural person associated with a registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A national securities exchange shall file notice with the Commission not less than thirty days prior to admitting any person to membership or permitting any person to become associated with a member, if the exchange knew, or in the exercise of reasonable care should have known, that such person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3)(A) A national securities exchange may deny membership to, or condition the membership of, a registered broker or dealer if (i) such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural persons associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or (ii) such broker or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant in accordance with procedures established by the rules of the exchange.

(B) A national securities exchange may bar a natural person from becoming a member or associated with a member, or condition the membership of a natural person or association of a natural person with a member, if such natural person (i) does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or (ii) has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the exchange and require any person associated with a member, or any class of such persons, to be registered with the exchange in accordance with procedures so established.

(C) A national securities exchange may bar any person from becoming associated with a member if such person does not agree (i) to supply the exchange with such information with respect to its relationship and dealings with the member as may be specified in the rules of the exchange and (ii) to permit the examination of its books and records to verify the accuracy of any information so supplied.

(4) A national securities exchange may (A) limit the number of members of the exchange and (B) the number of members and designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker: Provided, however, That no national securities exchange shall have the authority to decrease the number of memberships in such exchange, or the number of members and designated representatives of members permitted to effect transactions on the floor of such exchange without the services of another person acting as broker, below such number in effect on May

1, 1975, or the date such exchange was registered with the Commission, whichever is later: And provided further, That the Commission, in accordance with the provisions of section 19(c) of this title, may amend the rules of any national securities exchange to increase (but not to decrease) or to remove any limitation on the number of memberships in such exchange or the number of members or designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, if the Commission finds that such limitation imposes a burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(d)(1) In any proceeding by a national securities exchange to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the exchange to impose a disciplinary sanction shall be supported by a statement setting forth—

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this title, the rules or regulations thereunder, or the rules of the exchange which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reasons therefor.

(2) In any proceeding by a national securities exchange to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the exchange or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the exchange to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the exchange or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

(3) A national securities exchange may summarily (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the exchange determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the exchange, or (C) limit or prohibit any person with respect to access to services offered by the exchange if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the exchange determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the exchange. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the exchange in accordance with the provisions of paragraph (1) or (2) of this subsection. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and the protection of investors.

(c)(1) On and after the date of enactment of the Securities Acts Amendments of 1975, no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members: Provided, however, That until May 1, 1976, the preceding provisions of this paragraph shall not prohibit any such exchange from imposing or fixing any schedule of commissions, allowances, discounts, or other fees to be charged by its members for acting as broker on the floor of the exchange or as odd-lot dealer: And provided further, That the Commission, in accordance with the provisions of section 19(b) of this title as modified by the provisions of paragraph (4) of this section, may—

(A) permit a national securities exchange, by rule, to impose a reasonable schedule or fix reasonable rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange prior to November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees are in the public interest; and

(B) permit a national securities exchange, by rule, to impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange after November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees (i) are reasonable in relation to the costs of providing the service for which such fees are charged (and the Commission publishes the standards employed in adjudging reasonableness) and (ii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this title.

(2) Notwithstanding the provisions of section 19(c) of this title, the Commission, by rule, may abrogate any exchange rule which imposes a schedule or fixes rates of commissions, allowances, discounts, or other fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this title.

(3) Until December 31, 1976, the Commission, on a regular basis, shall file with the Speaker of the House and the President of the Senate information concerning the effect on the public interest, protection of investors, and maintenance of fair and orderly markets of the absence of any schedule or fixed rates of commissions, allowances, discounts, or other fees to be charged by members of any national securities exchange for effecting transactions on such exchange.

(4)(A) Before approving or disapproving any proposed rule change submitted by a national securities exchange which would impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange, the Commission shall afford interested persons (i) an opportunity for oral presentation of data, views, and arguments and (ii) with respect to any such rule concerning transactions effected after November 1, 1976, if the Commission determines there are disputed issues of material fact, to present such rebuttal submissions and to conduct (or have conducted under subparagraph (B) of this paragraph) such cross-examination as the Commission determines to be appropriate and required for full disclosure and proper resolution of such disputed issues of material fact.

(B) The Commission shall prescribe rules and make rulings concerning any proceeding in accordance with subparagraph (A) of this paragraph designed to avoid unnecessary costs or delay. Such rules or rulings may (i) impose reasonable time limits on each interested person's oral presentations, and (ii) require any cross-examination to which a person may be entitled under sub-

paragraph (A) of this paragraph to be conducted by the Commission on behalf of that person in such manner as the Commission determines to be appropriate and required for full disclosure and proper resolution of disputed issues of material fact.

(C)(i) If any class of persons, the members of which are entitled to conduct (or have conducted) cross-examination under subparagraphs (A) and (B) of this paragraph and which have, in the view of the Commission, the same or similar interests in the proceeding, cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings specifying the manner in which such interests shall be represented and such cross-examination conducted.

(ii) No member of any class of persons with respect to which the Commission has specified the manner in which its interests shall be represented pursuant to clause (i) of this subparagraph shall be denied, pursuant to such clause (i), the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation and there are substantial and relevant issues which would not be presented adequately by group representation.

(D) A transcript shall be kept of any oral presentation and cross-examination.

(E) In addition to the bases specified in subsection 25(a), a reviewing Court may set aside an order of the Commission under section 19(b) approving an exchange rule imposing a schedule or fixes rates of commissions, allowances, discounts, or other fees, if the Court finds—

(1) a Commission determination under paragraph (4)(A) that an interested person is not entitled to conduct cross-examination or make rebuttal submissions, or

(2) a Commission rule or ruling under paragraph (4)(B) limiting the petitioner's cross-examination or rebuttal submissions,

has precluded full disclosure and proper resolution of disputed issues of material fact which were necessary for fair determination by the Commission.

(f) The Commission, by rule or order, as it deems necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to assure equal regulation, may require—

(1) any person not a member or a designated representative of a member of a national securities exchange effecting transactions on such exchange without the services of another person acting as a broker, or

(2) any broker or dealer not a member of a national securities exchange effecting transactions on such exchange on a regular basis,

to comply with such rules of such exchange as the Commission may specify.

SECTION 19 OF THE EXCHANGE ACT, AS AMENDED BY THE SECURITIES ACTS AMENDMENTS OF 1975

(a)(1) The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 6, 15A or 17A of this title, respectively, publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if it finds that the requirements of this title and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

(2) With respect to an application for registration filed by a clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not grant registration prior to the sixtieth day after the date of publication of notice of the filing of such application unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that such clearing agency is so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible and that the rules of such clearing agency are designed to assure the safeguarding of such securities and funds.

(B) The Commission shall institute proceedings in accordance with paragraph (1)(B) of this subsection to determine whether registration should be denied if the appropriate regulatory agency for such clearing agency notifies the Commission within sixty days of the date of publication of notice of the filing of such application of such appropriate regulatory agency's (i) determination that such clearing agency may not be so organized or have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency may not be designed to assure the safeguarding of such securities and funds and (ii) reasons for such determination.

(C) The Commission shall deny registration if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (1)(B) of this subsection of such appropriate regulatory agency's (i) determination that such clearing agency is not so organized or does not have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency are not designed to assure the safeguarding of such securities or funds and (ii) reasons for such determination.

(3) A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

(b)(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Within thirty-five days of the date of publication of notice of the filing of a proposed rule change in accordance with paragraph (1) of this subsection, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall—

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within one hundred eighty days of the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(3)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change may take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable Federal and State law. At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 25 of this title nor deemed to be "final agency action" for purposes of section 704 of title 5, United States Code.

(4) With respect to a proposed rule change filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(B) The Commission shall institute proceedings in accordance with paragraph (2)(B) of this subsection to determine whether any such proposed rule change should be disapproved, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of publication of notice of the filing of the proposed rule change of such appropriate regulatory agency's (i) determination that the proposed rule change may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(C) The Commission shall disapprove any such proposed rule change if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (2)(B) of this subsection of such appropriate regulatory agency's (i) determination that the proposed rule change is inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(D) The Commission shall abrogate any change in the rules of such a clearing agency made by a proposed rule change which has taken effect pursuant to paragraph (3) of this subsection, require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection, and reviewed in accordance with the provisions of paragraph (2) of this subsection, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of filing of such proposed rule change of such appropriate regulatory agency's (i) determination that the rules of such clearing agency as so changed may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(c) The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of title 5, United States Code, for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making rules and regulations pursuant to any other authority under this title.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this title to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(d)(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member, or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this title.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appro-

priate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(e)(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this title, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this title, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner consistent with the purposes of this

title, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

(g)(1) Every self-regulatory organization shall comply with the provisions of this title, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 17(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this title, may relieve any self-regulatory organization of any responsibility under this title to enforce compliance with any specified provision of this title or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h)(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this title, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 15(b)(4) of this title or if such appropriate regulatory agency

finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 15(b)(6) or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to remove from office or censure any officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such officer or director has willfully violated any provision of this title, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

(i) If a proceeding under subsection (h)(1) of this section results in the suspension or revocation of the registration of a clearing agency, the appropriate regulatory agency for such clearing agency may, upon notice to such clearing agency, apply to any court of competent jurisdiction specified in section 21(d) or 27 of this title for the appointment of a trustee. In the event of such an application, the court may, to the extent it deems necessary or appropriate, take exclusive jurisdiction of such clearing agency and the records and assets thereof, wherever located; and the court shall appoint the appropriate regulatory agency for such clearing agency or a person designated by such appropriate regulatory agency as trustee with power to take possession and continue to operate or terminate the operations of such clearing agency in an orderly manner for the protection of participants and investors, subject to such terms and conditions as the court may prescribe.

MOTION FILED
JUN 4 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Nos. 80-757, 80-895, 80-936

NEW YORK MERCANTILE EXCHANGE,
Petitioner,

vs.

LEIST,
Respondent;

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

LEIST,
Respondent;

HEINHOLD COMMODITIES, INC.,
Petitioner,

vs.

LEIST,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

MOTION BY SUNNYSIDE EGGS, INC. ET AL. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Sunnyside Eggs, Inc., *et al.*[1] hereby respectfully move pursuant to Supreme Court Rule 36 for leave to file a brief amicus curiae in these cases. Consent of the petitioners and respondent to file this brief was requested but refused.

Sunnyside and the other amici curiae (collectively "Sunnyside") are egg producers located in the southeastern United States. They are plaintiffs in the suit styled *Sunnyside Eggs, Inc. v. Urner Barry Publications, Inc.*, Civil Action File No. C78-1661A, which is presently pending in the United States District Court for the Northern District of Georgia. Sunnyside's suit alleges that Urner Barry, an organization which issues and distributes quotations for a number of commodities, has damaged Sunnyside's business by manipulating the "cash" or "spot" market for table grade eggs in violation of § 9(b) of the Commodity Exchange Act ("CEA").

The interest of Sunnyside here is to present to the Court the position of producers of agricultural commodities who are damaged by manipulation of the cash markets in which they sell their products. Sunnyside maintains that a private right of action should be implied in § 9(b) of the CEA insofar as manipulation of *cash* markets is concerned. Since the Court has agreed to decide the question of whether an im-

[1] The other entities which join in this motion seeking leave to file an amicus curiae brief are Clarendon Poultry Farms, Inc.; Colonial Egg Processors, Inc.; Elrod Food Products, Inc.; Galloway Egg Farms, Inc.; Green Meadow Farms, Inc.; Kuder Citrus Feed Company, Inc.; Southern Egg Corporation and Springdale Eggs, Inc.

plied private right of action should be found in numerous sections of the CEA, including § 9(b), with respect to manipulation of commodities *futures* markets, resolution of that issue by the Court could have a direct impact on Sunnyside and others who have been victimized by manipulation of cash markets.[2]

Unlike the futures market, however, the reparations provisions contained in 7 U.S.C. § 18 (1976) are generally unavailable against manipulators of cash markets. Thus, if no implied private right of action were found in § 9(b) with respect to cash markets, manipulation of these markets will effectively go unchallenged under the CEA. This result would be contrary to the intent of Congress and is against public policy.

In view of the issues and ramifications of the *Leist* cases with respect to cash markets, which are broader in scope than the direct interests of the parties thereto, Sunnyside respectfully requests that it be permitted to file an amicus curiae brief in these cases so that the views of Sunnyside and those similarly situated may

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[2] The plaintiff in *Incomco v. New York Mercantile Exchange*, one of the cases consolidated herein, sued in part for injuries it suffered as a cash trader of potatoes. Incomco was not, however, a producer of potatoes seeking to hedge its risks, but rather a speculator in the cash market. *Leist v. Simplot*, 638 F.2d 283, 291-3 (2d Cir. 1980). Moreover, Incomco's cash market injury resulted from the defendants' manipulation of the futures market for potatoes. In contrast, there is not even a hint of manipulation of any futures market in Sunnyside's action. Thus, the issue of whether deliberate manipulation of a cash market is enforceable through a private right of action implied in the CEA is not squarely before the Court in the cases it has agreed to hear.

be more adequately presented. The brief Sunnyside seeks leave to file accompanies this motion.

Respectfully submitted,

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June 2, 1981

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IN THE

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OCTOBER TERM, 1980

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF SUNNYSIDE EGGS, INC. ET AL.
AS AMICI CURIAE IN SUPPORT
OF RESPONDENT**

INTEREST OF THE AMICI CURIAE

These amici (collectively "Sunnyside") are nine egg producers located in the Southeastern United States.[1] In September, 1978, Sunnyside filed suit in the United States District Court for the Northern District of Georgia, Atlanta Division,[2] against Urner Barry Publications, Inc. ("Urner Barry"), a market reporter which issues a daily price quotation for the "spot" or "cash" market for table grade eggs. The first count of Sunnyside's complaint alleged that Urner Barry has damaged Sunnyside's business by manipulation of the price of eggs in interstate commerce through the dissemination of misleading or knowingly inaccurate reports concerning the cash market for eggs in violation of 7 U.S.C. § 13(b) (1976) [§ 9(b) of the Commodity Exchange Act (the "CEA")].[3]

The District Court dismissed that portion of Sunnyside's complaint which was based on § 9(b) of the CEA, ruling there was no private right of action implied in that statute. A copy of the District Court's

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[1] The amici are Sunnyside Eggs, Inc.; Clarendon Poultry Farms, Inc.; Colonial Egg Processors, Inc.; Elrod Food Products, Inc.; Galloway Egg Farms, Inc.; Green Meadow Farms, Inc.; Kuder Citrus Feed Company, Inc.; Southern Egg Corporation; and Springdale Eggs, Inc.

[2] Civil Action File No. C78-1661A.

[3] Between 80 and 90% of the table grade shell eggs sold in the United States east of the Rocky Mountains are traded in relationship to quotations issued by Urner Barry. Sunnyside's complaint also alleges that Urner Barry has monopolized or attempted to monopolize the market for egg price reporting services and that Urner Barry has misrepresented the market value of eggs in violation of common law tort principles.

opinion and order is attached as Exhibit A. The District Court is presently reconsidering its decision pending this Court's rulings in these cases. Copies of the orders holding the District Court's earlier decision in abeyance are attached as Exhibits B and C.

Sunnyside's interest in the cases before this Court is obvious: Any ruling by this Court could be dispositive of Sunnyside's claims under § 9(b) of the CEA. However, the litigation before the Court has significant distinctions from Sunnyside's suit. The cases this Court has agreed to hear involve the alleged manipulation of a commodity futures market;[4] Sunnyside's suit, on the other hand, concerns manipulation of the *cash* or *spot* market for a commodity.[5]

The anti-manipulation and anti-fraud provisions of § 9(b) apply to both futures markets and cash markets. The Commodity Futures Trading Commission

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[4] Petitioners in *Leist* are futures commission merchants and other traders in potato futures contracts. Respondents are holders of "long" positions in potato futures. *National Super Spuds, Inc. v. New York Mercantile Exchange*, 470 F.Supp. 1256, 1258 (S.D.N.Y. 1979).

[5] The plaintiff in *Incomco v. New York Mercantile Exchange*, one of the cases consolidated herein, sued in part for injuries it suffered as a cash trader of potatoes. Incomco was not, however, a producer of potatoes seeking to hedge its risks, but rather a speculator in the cash market. *Leist v. Simplot*, 638 F.2d 283, 291-3 (2d Cir. 1980). Moreover, Incomco's cash market injury resulted from the defendants' manipulation of the futures market for potatoes. In contrast, there is not even a hint of manipulation of any futures market in Sunnyside's action. Thus, the issue of whether deliberate manipulation of a cash market is enforceable through a private right of action implied in the CEA is not squarely before the Court in the cases it has agreed to hear.

("CFTC") actively regulates only futures markets, however, and not cash markets, and the unavailability of an administrative remedy has previously been viewed by this Court as one factor weighing in favor of finding a Congressional intent to imply a private right of action. *Cannon v. University of Chicago*, 441 U.S. 677, 707 n. 41 (1979).

Sunnyside is concerned that if this Court were to rule that there is no implied private right of action under any provision of the CEA, cash market traders like Sunnyside would be left without either a judicial or an administrative forum for redress of manipulation of cash markets proscribed by § 9(b) of the CEA. Sunnyside therefore files this brief to insure that the Court is aware of the separate and distinct interests of those damaged by manipulation of cash markets. Sunnyside urges that the Court expressly reserve decision as to whether there is an implied private right of action in the CEA for manipulation of *cash* markets — an issue not presented in the cases the Court has agreed to hear.

SUMMARY OF ARGUMENT

Certain provisions of the CEA clearly extend to both futures markets and cash markets, *e.g.* § 9(b), 6(c) [now 7 U.S.C. § 13b (1976)], and § 13 [now 7 U.S.C. § 13c (1976)]. The CFTC's administrative expertise and enforcement mechanisms are, however, directed almost exclusively toward regulation of commodity futures transactions, not to regulation or supervision of cash markets. Thus, the existence of the CFTC's reparations procedures as a parallel avenue for meaning-

ful redress — a consideration that tends to mitigate against implication of a private right of action in the CEA — is not available to Sunnyside or others who are victims of cash market manipulation that violates § 9(b). This, coupled with the fact that there is no administrative agency which enforces the anti-manipulation provisions of § 9(b) in cash markets, would leave manipulators of cash markets undeterred by the threat of effective enforcement, public or private, of the CEA unless a private right of action is implied in § 9(b) with respect to manipulation of cash markets.

ARGUMENT

I. The Commodity Exchange Act Applies to Cash markets as Well as to Futures Markets.

Section 9(b) of the CEA provides that, it is unlawful:

> . . . [F]or any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, . . . or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.[6]

[6] This language was contained in the CEA when it was originally enacted in 1936. Despite ministerial amendments altering the penalties in this statute in 1968, 1974 and 1978, it has remained otherwise unchanged since its enactment.

Thus, it is clear that § 9(b) prohibits not only manipulation of commodity futures markets but also manipulation of commodity cash markets, and it is for manipulation of a cash market that Sunnyside has sued Urner Barry.[7]

II. The Reparations Procedures Contained in 7 U.S.C. § 18 (Supp. III 1979) Are Not Available to Sunnyside.

The 1974 amendments to the CEA created within the CFTC a procedure through which "any person complaining of any violation of any provision" of the CEA by a futures commission merchant, floor broker, commodity trading advisor or commodity pool operator[8] might apply to the CFTC for relief.[9] 7 U.S.C. § 18(a)

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[7] Manipulation of the cash market for eggs has occurred previously. *See United Egg Producers v. Bauer International Corp.*, 311 F.Supp. 1375 (S.D.N.Y. 1970). Relief from the manipulative practices in *United Egg Producers* was obtained under §9(b) of the CEA.

[8] These terms are defined in 7 U.S.C. §2 (Supp. III 1979).

[9] 7 U.S.C. §18(a) (Supp. III 1979) provides in full:

> Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

(Supp. III 1979). Persons who are not futures commission merchants, floor brokers, commodity trading advisors or commodity pool operators are not subject to these "reparations" procedures. Accordingly, manipulation of a cash market or dissemination of false information by a person who does not fall within one of these four categories is not subject to administrative review, and compensation for damages suffered from illegal conduct by such persons may not be obtained through the CFTC.[10] CFTC personnel have informed counsel for Sunnyside that there has never been a reparations action filed for manipulation of any cash market.

III. The CFTC Has Not Actively or Effectively Regulated Cash Markets.

A. *The CFTC may lack regulatory authority over cash markets.*

The CFTC, as its name states, regulates trading in commodities *futures*. The CFTC is granted exclusive administrative jurisdiction over "accounts, agreements . . . and transactions involving *contracts of sale of a commodity for future delivery* . . . ." 7 U.S.C. § 2 (Supp. III 1979). (Emphasis added.) The term "future delivery" is later defined in 7 U.S.C. § 2 (Supp. III 1979) as "*not* includ[ing] any sale of any cash commodity for deferred shipment or delivery." (Emphasis added).

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[10] Urner Barry registered as a commodity trading advisor approximately 14 months after Sunnyside's suit was filed. Urner Barry's status as a commodity trading advisor is disputed by Sunnyside and has never been ruled on by the District Court.

Moreover, regulation of cash commodity transactions by the CFTC was most likely never intended by Congress. As one commentator has stated: "With respect to grains, and later other commodities, the draftsmen [of the various commodities laws] knew that federal regulation or taxation of cash forward contracts was inappropriate and unintended." Clark, *Genealogy and Benefits of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 *Emory L.J.* 1175, 1190 (1978).

The legislative history of the 1974 and 1978 amendments to the CEA also indicates that the CFTC may not have the authority to regulate cash markets. *See*, 120 CONG. REC. 10261-62 (1974) and *Hearings Before the House Subcom. on Conservation and Credit of the Comm. on Agriculture*, 95th Cong., 2d Sess. 63 (1978).

B. *Even if the CFTC has the authority to regulate cash markets, it has not exercised that authority and does not have the resources to exercise it.*

Even if the CFTC has some regulatory auspices over cash markets, scrutiny of cash markets has never been given prominence in the CFTC's enforcement scheme. Alex C. Caldwell, Administrator of the Commodity Exchange Authority, testified in 1974 as follows:

> Mr. Rainbolt. Item 8 deals with the problem of investigation by the Commodity Exchange Authority [the predecessor of the CFTC] of cash market manipulations. You are asking for authority to eliminate that requirement as a burden on the CEA. What

> sort of program do you presently have in effect for investigating these transactions?
>
> Mr. Caldwell. Not very much of a program, Mr. Rainbolt. There are thousands and thousands of cash markets around the country where price manipulation could occur. We are not staffed to handle that type of investigation and I do not really believe that Congress actually intended for us to get into this. Our role is really in futures trading and cash markets to the extent that they are connected with such futures trading.

Colloquy between John Rainbolt,[11] Associate Counsel to the Committee, and Alex C. Caldwell, *Hearings Before the House Comm. on Agriculture*, 93rd Cong., 1st Sess. 30 (1973).

The CFTC's Advisory Committee on Definition and Regulation of Market Instruments subsequently recommended that the CFTC's only role in cash markets be that of monitoring cash markets for manipulation that affects futures markets and that the CFTC "should not commit itself to the massive and largely uncontrollable expense of continuous monitoring of any cash market." Recommended Policies on the Cash Market Regulatory Authority and Cash Market Data Needs of the Commodity Futures Trading Commission, Report of the Advisory Committee on Definitions and Regulation of Market Instruments. *Comm. Fut. L. Rep.* (CCH) ¶ 20,225 (10/18/76).

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[11] Mr. Rainbolt was subsequently named Vice Chairman of the CFTC.

In point of fact, therefore, the CFTC has no history of regulating cash markets, no desire to regulate those markets (except, perhaps, to the extent that they affect futures markets) and no resources to regulate those markets. Such a "back-burner" approach to regulation of cash markets is strong evidence of the need for an implied private right of action to control manipulators of these markets.

IV. Implication of a Private Right of Action, at Least with Respect to Cash Markets, is Consistent With the "Underlying Purposes of the Legislative Scheme."

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court listed four factors as indicating whether an implied private right of action should be found in any statute. Those factors were whether (i) the plaintiff was a member of the class for whose especial benefit the statute was enacted, (ii) the legislature intended to imply a private right of action, (iii) an implied private right of action would be consistent with the underlying purposes of the legislative scheme and (iv) the cause of action was one traditionally relegated to state law so that it would be inappropriate to imply a cause of action under federal law. Subsequent opinions by this Court make it clear that the central inquiry is whether the legislature intended to imply a private right of action and that the other *Cort v. Ash* factors are useful primarily as a means for determining legislative intent. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

The fact that administrative reparations are avail-

able against only certain classes of persons who violate the CEA indicates that it would not interfere with the underlying purpose of the legislative scheme — the third *Cort v. Ash* factor — to imply a private right of action in the CEA. This is especially true in those instances where reparations procedures are unavailable to the plaintiff, because the defendant is not a member of one of the limited groups of persons against whom reparations actions can be maintained. Indeed, Congress' willingness to extend the CFTC's reparations procedures only to actions against certain classes of persons demonstrates that Congress never intended reparations to be the only means of pursuing violations of the CEA.

CONCLUSION

Sunnyside requests that the Court (i) decide only the precise issue before it, *i.e.*, whether a private right of action is implied in the CEA against persons who are clearly subject to regulation by the CFTC and against whom reparations pursuant to 7 U.S.C. § 18 (Supp. III 1979) are clearly available, and (ii) withhold decision as to whether a private right of action should be implied in the CEA under other circumstances.

Respectfully submitted,

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Amici Curiae

June 2, 1981

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SUNNYSIDE EGGS, INC., *et al.*,	:	CIVIL ACTION FILE
Plaintiff,	:	NO. C78-1661A
vs.	:	
URNER BARRY PUBLICATIONS, INC.	:	
Defendant.	:	

ORDER OF COURT

Plaintiffs produce and process eggs and sell them in interstate commerce. Urner Barry publishes price quotations for eggs through a printed publication and by telephone, both forms of communications being disseminated in interstate commerce. In Count I of their complaint, plaintiffs allege that Urner Barry has violated Commodity Act § 9(b), 7 U.S.C. § 13(b), by

> (a) Delivering for transmission and transmitting, through the mails and other means of interstate communication, false, misleading and knowingly inaccurate price quotations for eggs, which quotations affect or tend to affect the prices at which eggs are sold by Plaintiffs and others in interstate commerce; and (b) Attempting to manipulate and manipulating the prices of eggs sold by Plaintiffs and others in interstate commerce.

Complaint ¶ 14(a)-(b). In Count II, plaintiffs allege that Urner Barry has attempted to monopolize and has monopolized the market for its services in violation of Sherman Act § 2, 15 U.S.C. § 2. Specifically, Urner Barry allegedly has no competitor in the reporting of egg prices in the geographic area east of the Rocky Mountains and has been engaged, is now engaged, and will engage in the following practices:

> (a) Utilizing the false, misleading and inaccurate Urner Barry Quote as a means and mechanism of unlawfully attempting to acquire, acquiring and maintaining a monopoly in the market for reporting services for egg price quotations;
>
> (b) Manipulating the Urner Barry Quote to foreclose or prevent effective competition from alternative egg price reporting mechanisms; and
>
> (c) Reserving exclusive rights to the Urner Barry Quote and demanding exclusive rights to or control over the dissemination of prices or quotations from proposed alternative egg price reporting mechanisms.

Complaint ¶ 18(a)-(c). Count III alleges fraudulent, reckless, or negligent misrepresentation. Defendant has counterclaimed under Sherman Act § 1, 15 U.S.C. § 1, alleging that plaintiffs and others have conspired to fix prices, to force defendant to join their alleged conspiracy, and to file this lawsuit in pursuit of their alleged conspiracy.

Urner Barry's Motion to Dismiss

Urner Barry seeks dismissal of Count I of plain-

tiffs' complaint on the ground that there is no implied private cause of action under 7 U.S.C. § 13(b). Defendant further contends that the other two counts should be dismissed because they fall within the primary jurisdiction of the Commodities Futures Trading Commission (CFTC).[1] For the reasons given below, the Court GRANTS the motion only with respect to Count I.

I. *Overview of Commodity Exchange Act (CEA)*

Government regulation of commodities and of commodities futures has a much older history than one might expect. Beginning in 1844 Congress rejected numerous bills which, if enacted into law, would have prohibited futures trading in commodities. By the early 1920's Congressional sentiment had turned from prohibition to regulation, and in 1922 the Grain Futures Act was enacted. Act of Sept. 21, 1922, c.369, 42 Stat. 998.

> The Grain Futures Act of 1922 was designed mainly to enable the Government to deal with the exchanges themselves, rather than with individual traders. To conduct futures trading lawfully, the grain exchanges were required to be federally licensed or "designated" as "contract markets." A condition of such designation was that the exchanges themselves would take major responsibility for the prevention of price manipulation by their members. If they failed to do so, the only recourse was the

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[1] It is not entirely clear, but defendant apparently offers this argument as an alternative ground for dismissal of Count I.

suspension or revocation of their designations, and this was scarcely advisable. Although the legislation did provide for legal action by the Government against price manipulation, some of the legal actions undertaken against alleged manipulators proved ineffectual because of limitations and loopholes in the early law. The Act of 1922 did, however, provide the means for effective and continuous fact-finding and investigations by the U.S. Department of Agriculture which pointed to the sources and patterns of excessive speculation and price manipulation, and clearly showed that the limited regulatory powers authorized were inadequate in dealing with these and other market abuses. Beginning in 1927, the Department began submitting recommendations to Congress for additional legislation, and these eventually resulted, after extensive congressional hearings in the 1934-36 period, in the amended legislation of the latter year.

Under these amendments of 1936, the legislation was renamed the Commodity Exchange Act and the regulatory coverage was extended to cotton and other specified commodities as well as grains. Broad additional authority was granted to deal with market abuses by traders generally as well as exchange members, to prosecute price manipulation as a criminal offense, to curb excessive speculation by the large market operator, and to extend regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud, and fictitious transactions in futures which were seriously impairing the services of the market.

Sen. Rep. No. 95-850, 95th Cong., 2d Sess. (1978), *re-*

printed in [1978] *U.S. Code Cong. & Ad. News*, 2087, 2095-96; *Sen. Rep. No.* 93-1131, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] *U.S. Code Cong. & Ad. News* 5843, 5855.

The focus of the 1974 amendment to the CEA was the creation of the CFTC. The CFTC was given authority to bring injunctive actions in the district courts when it appears to the CFTC that any person is violating "any provision" of the CEA. 7 U.S.C. § 13a-1. Congress also created an administrative reparations procedure for the violations of the CEA by any person registered or required to be registered under 7 U.S.C. § 6. 7 U.S.C. § 18. Persons required to be registered include futures commission merchants (§ 6d and j), floor brokers (§ 6e and j), and commodity trading advisers and commodity pool operators (§ 6m). The 1978 amendment permits states to sue in federal court "to obtain damages... or... other relief...." 7 U.S.C. § 13a-2(1).

Another administrative procedure has been available since 1922. Under 7 U.S.C. § 9 the CFTC may proceed administratively against anyone who "is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity..." and order that person to cease trading on exchanges. The CFTC may also suspend a violator's registration and exact a civil fine of up to $100,000; review of a CFTC order under section 9 may be obtained in a United States Court of Appeals. 7 U.S.C. § 9.

The statute sued under here, 7 U.S.C. § 13(b), has existed in its present form without major change since

1922; it provides:

> It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

II. Implied Cause of Action Under 7 U.S.C. § 13(b)

The question of whether 7 U.S.C. § 13(b) creates an implied cause of action is a threshold question which is significantly different from such other threshold

questions as standing and subject matter jurisdiction.

> Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the constitution or laws of the United States, to hear a case; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal court jurisdiction; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court. . . .

Davis v. Passman, _____ U.S. _____, 99 S.Ct. 2264, 2274 n. 18 (1979) (emphasis in original). *See also, e.g., Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1067 (5th Cir. 1979); *Wilson v. First Houston Invt. Corp.*, 566 F.2d 1235, 1237 n. 2 (5th Cir. 1978), *vac'd on other grounds*, _____ U.S. _____, 100 S.Ct. 442 (1979), *remanded*, slip op. No. 75-3422 (5th Cir. Feb. 21, 1980); *Alkan v. Rosenthal & Co.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,797 at p. 23, 252 (S.D. Ohio Feb. 28, 1979). Thus with respect to this issue, the motion of Urner Barry should be construed as a motion to dismiss for failure to state a claim.

A. *Pre-1974 and Post-1975*

Prior to 1974 or 1975 there was little question that the CEA gave rise to an implied private cause of action. At least two courts even so construed 7 U.S.C. § 13(b), the section at issue here. *Deaktor v. C. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Merc. Exch. v. Deak-*

tor, 414 U.S. 113 (1973); *United Egg Prod'rs. v. Bauer Int'l Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1975). At that time the reigning Supreme Court authority on implied causes of action was *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). In *Borak* the court held that Securities Exchange Act § 14(a), 15 U.S.C. § 78n(a), provides a private cause of action for a shareholder damaged by a false and misleading proxy statement. The Court reasoned that the presence of a broad jurisdictional statute within the Securities Exchange Act — § 27, 15 U.S.C. § 78aa — and the "duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose" required the implication of a private cause of action. *Id.* at 430-33. More recent events require the reexamination of whether there is an implied cause of action under 7 U.S.C. § 13(b).

First, Congress amended the CEA in 1974 and 1978, broadly expanding the number and scope of remedies available as described *supra* pp. 3-4. Second, the Supreme Court, beginning in 1975 in *Cort v. Ash*, 422 U.S. 66 (1975), and culminating in several very recent cases, has become much more reluctant to imply a private cause of action from a statute. In *Cannon v. University of Chicago*, _____ U.S. _____, 99 S. Ct. 1946, 1958 (1979), Justice Stevens wrote that "It was *after* 1972 that this Court decided *Cort* and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute. We, of course, adhere to the strict approach. . . ." (Emphasis added.) Less than a month later, Justice Rehnquist observed that "The invocation of the 'remedial purposes' of the . . . Act is . . . unavailing. . . . To the

extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today." *Touche Ross & Co. v. Reddington*, _____ U.S. _____, 99 S.Ct. 2479, 2490 (1979), *citing Cannon*, _____ U.S. at _____, 99 S.Ct. at 1958.

B. *Cort v. Ash Factors*

In *Cort* the Supreme Court was asked to imply a private cause of action for damages from 18 U.S.C. § 610, providing in part:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office. . . .

Rejecting the contention that the statute gives rise to an implied private cause of action, Justice Brennan described a pattern of inquiries which a court must make in determining whether a private cause of action may be implied.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the

> legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted). Recent cases, decided after the 1974 amendments to the CEA and the Supreme Court's opinion in *Cort*, have split over whether the CEA gives rise to an implied private cause of action.[2] Only *Liang v. Nelson Bunker Hunt* concerns 7 U.S.C. § 13(b); there Judge Decker of the Northern District of Illinois held that there is no implied private cause of action under section 13(b).

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[2] The following cases have found an implied cause of action under the CEA: *Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *Jones v. B. C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979); *R. J. Hereley & Sons v. Stotler & Co.*, 466 F. Supp. 395 (N.D. Ill. 1979); *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Gravois v. Fairchild*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,706 (E.D. La. 1978); *Hofmayer v. Dean Witter & Co.*, 459 F. Supp. 733 (N.D. Calif. 1978); *Berenson v. Madda Trdg. Co.*, 2 Comm. Fut. L. Rep. (CCH) § 22,796 (D.D.C. 1978); *Kelley v. Carr*, 442 F. Supp. 346 (N.D. Mich. 1977). Cases reaching the opposite conclusion include: *Fischer v. Rosenthal & Co.*, No. 3-77-0824-H (N.D. Tex. December 11, 1979); *National Super Spuds, Inc. v. New York Mercantile Exch.*, 470 F.Supp. 1256 (S.D.N.Y. 1979); *Liang v. Nelson Bunker Hunt*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,800 (N.D. Ill. 1979); *Alkan v. Rosenthal & Co.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 20,797 (S.D. Ohio 1979); *Berman v. Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311 (S.D. Ohio 1979). The Fifth Circuit has twice left the question open. *Chipser*, 600 F.2d at 1067 (5th Cir. 1979); *Moody v. Bache & Co.*, 570 F.2d 523, 529 (5th Cir. 1978).

1. *Class for whose especial benefit statute was enacted*

It is essential to begin this analysis by looking to the language of the statute itself. *Transamerica Mtg. Advisors v. Lewis*, _____ U.S. _____, 100 S.Ct. 242, 245 (1979); *Touche Ross*, _____ U.S. at _____, 99 S.Ct. at 2485; *Cannon*, _____ U.S. at _____, 99 S.Ct. at 1953; *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 24 (1977). Although 7 U.S.C. § 13(b) is not the sort of statute which embodies no rights or prohibitions in favor of anyone,[3] it is unclear from the language of statute itself who should be deemed to benefit from the statute. While it may not be significant that there is no *expressly* named beneficiary,[4] it is significant that 7 U.S.C. § 13(b) is a criminal statute. In both *Cort* and *Chrysler Corp. v. Brown*, _____ U.S. _____, 99 S.Ct. 1705, 1725 n. 46, the Supreme Court distinguished earlier cases in which private causes of action had been implied from criminal statutes. *Citing Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Borak, supra; Texas & Pac. R. Co. v. Rigsby*, 241 U.S.

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[3] *Compare Touch Ross*, _____ U.S. at _____, 99 S.Ct. at 2485, construing Securities Exchange Act § 17(a), 15 U.S.C. § 78q.

[4] In *Cannon*, _____ *U.S. at* _____, 99 S.Ct. at 1954, the Court compared the statute it was then construing — "which expressly identifies the class Congress intended to benefit" — with criminal statutes. Apparently, however, the Court did not intend to rewrite the first *Cort* factor to require an "*express*" designation, because the "*express*" language did not appear as a requirement in *Touche Ross, supra*, or *Transamerica, supra.*

33 (1916). *Wyandotte* involved the significantly different issue of whether the United States had an implied civil cause of action where it concededly had not only a criminal remedy but an *in rem* civil action as well. *Cort*, 422 U.S. at 79 n. 11. In *Rigsby*, the Court found language in the statute under consideration "pertinent only to a private right of action for damages . . . thus rendering '[t]he inference of a private right of action . . . irresistable.'" *Cort*, 422 at 80 n. 11, *citing Rigsby*, 241 U.S. at 40. *Borak*, of course, has been expressly repudiated by the Supreme Court. *See* p. 6, *supra*.[5]

While the Supreme Court seems to have left open the possibility that some criminal statutes may create rights in favor of some specific class, this Court believes that 7 U.S.C. § 13(b) is not such a statute. Plaintiffs maintain that the statute creates rights for the benefit of producers and processors such as themselves, citing several cases including *Liang*, *supra*. In *Liang* the district court noted that the antispeculation provision in 7 U.S.C. § 6(a)(1) was designed to protect producers *and* consumers, 2 Comm. Fut. L. Rep. at p. , and then went on to state that "the price manipulation provision [in 7 U.S.C. § 13(b)] is a general criminal statute for the benefit of the public at large." *Id.* at p. . While one can find isolated statements in cases and in the legislative history referring to this group or that group as the intended beneficiary of 7 U.S.C. § 13(b), this Court agrees with the view expressed in *Liang* that the statute is designed to benefit

[5] Both *Borak*, 377 U.S. at 431-33, and *Rigsby*, 241 U.S. at 39-40, relied to some extent on the now outmoded notion that where there is a right there is a remedy.

the public at large. This view is supported by the emphasis in the legislative history on the far-reaching shock effects in the nation's economy of any effect on the price of commodities. *See e.g., Sen. Rep.* No. 95-850, *supra*, 1978 *U.S. Code Cong. & Ad. News* at pp. 2093-2105.

2. *Legislative intent*

The two most recent Supreme Court cases dealing with implied private causes of action have significantly explained the four-step analysis originally established in *Cort*, emphasizing that the "central inquiry" is legislative intent. *Transamerica*, _____ U.S. at _____, _____, 100 S.Ct. at 245, 249; *Touche Ross*, _____ U.S. at _____, _____, 99 S.Ct. at 2485, 2489. While the legislative intent behind 7 U.S.C. § 13(b) is by no means clear and conclusive, it most likely indicates a lack of intent to create a private remedy. As the *Liang* court observed, this second factor takes on great significance where, as here, "the Court has determined that plaintiffs are not members of a class for whose especial benefit the statute was enacted. . . ." 2 Comm. Fut. L. Rep. at p , *citing Cort*, 422 U.S. at 82-83.

Plaintiffs rely to a great extent on the alleged Congressional recognition and adoption of existing case law holding that the CEA gives rise to an implied cause of action. In *Cannon* the Court found an implied private cause of action under Section 901(a) of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, citing as its first reason that when Title IX was enacted in 1972, Congress was presumably aware that the courts had been implying a pri-

vate cause of action under the virtually identical Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d. *Cannon*, _____ U.S. at _____, 99 S.Ct. at 1956-61.

With respect to the CEA, courts have observed that in 1974 and 1978 when the CEA was amended, Congress was aware that the courts had implied a private cause of action under the CEA. *E.g.*, *Smith v. Groover*, 468 F. Supp. at 113, (*citing* Remarks of Rep. Poage, 119 Cong. Rec. 41333 (1973); Hearings on H.R. 11955 Before the House Committee on Agriculture, 93rd Cong., 2d Sess. 249, 321, Hearings on S. 2485, S. 2578, S. 2837 and H. R. 12113 Before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 3, at 737, 746 (1974)); *Hofmayer* 459 W. Supp. at 738. Those references to legislative history do not clearly and unambiguously recognize private causes of action under the CEA — *let alone under 7 U.S.C. § 13(b)*. The citations to legislative history in plaintiff's supplemental brief are equally inconclusive with respect to the Congressional recognition of a private cause of action under 7 U.S.C. § 13(b). Indeed, one Senator who spoke favorably of implied causes of action under the CEA, noted that the courts are split over the issue. Remarks of Senator Huddleston, 124 Cong. Rec. S. 10537 (July 12, 1978). In any event other factors dilute the significance of plaintiffs' references to legislative history. First, Congress has rejected three bills which, if enacted, would have created an express private cause of action: H.R. 11195, 93d Cong., 1st Sess. § 17(3) (1973); S. 2387, 93d Cong., 1st Sess., 1st Sess. § 505 (1973); S. 2578, 93d Cong., 1st Sess. § 20(3) (1973). *National Super Spuds*, 470 F. Supp. at 1260.

Those bills contained provisions permitting recovery of treble damages, and plaintiffs thus conclude that Congress simply refused to expand the existing implied cause of action, *citing Smith v. Groover*, 466 F. Supp. at 113. Plaintiffs' argument fails to recognize, however, that at least one of the bills, S. 2837, distinguished between actual damages for non-wilful violations and treble damages for wilful violations. *National Super Spuds*, 470 F. Supp. at 1260 n. 25. In addition, the Court notes that a recent listing of the remedies available under the CEA, noticeably omitted any mention of a private cause of action. *Berman*, 467 F. Supp. at 322, *citing* Sen. Rep. No. 95-850, *supra*, 1978 *U.S. Code Cong. & Ad. News* at pp. 2100-01.

A second indicator of legislative intent discussed in the Supreme Court cases is the presence or absence of other remedies. In *Cort*, the Supreme Court found no implied private cause of action, but expressly rejected an argument of the defendants to the effect that the presence of other express private remedies in later enacted statutes which were related to the one under consideration impliedly negated the existence of any implied private cause of action in the statute under consideration. 422 U.S. at 82-83 n. 14. The Court reasoned that the defendants' reliance on *National R.R. Pass. Corp. v. National Assn. of R.R. Pass. (Amtrak)*, 414 U.S. 453 (1974); and *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), was misplaced because in those cases there was support in the legislative history for the proposition that the express remedies were exclusive. *Cort*, 422 U.S. at 83 n. 14, *citing Amtrak*, 414 U.S. at 458-61; *T.I.M.E.*, 359 U.S. at 471-72, 477, & n. 18. Moreover, Justice Brennan reasoned in *Cort* that

"it would be odd to infer from Congress' actions concerning the newly created provisions . . . any intention regarding the enforcement of a long-existing statute." 422 U.S. at 83 n. 14.

More recent cases may have at least implicitly eroded the significance of contemporaneous enactment in determining whether the existence of one remedy implies the non-existence of all others. The Court in *Touche Ross*, construing Securities Exchange Act § 17(a), 15 U.S.C. § 78q(a), noted the express creation of a private cause of action in Securities Exchange Act § 18(a), 15 U.S.C. § 78r(a), to remedy injuries similar to those complained of by the plaintiff under section 17(a), and concluded that "[W]here the principal express civil remedy for misstatements in reports created by Congress *contemporaneously* with the passage of § 17(a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in § 17(a) that is significantly broader than the remedy that Congress chose to provide." *Touche Ross*, _____ U.S. at _____, 99 S.Ct. at 2489 (emphasis added). The Court cited several cases, including *Amtrak* and *T.I.M.E.*, but failed to mention its discussion in footnote 14 of *Cort*. Moreover, it is arguable that the controlling factor was the express limitation in section 18(a) to purchasers and sellers rather than the contemporaneous enactment of sections 17(a) and 18(a).

Transamerica, however, provides more solid support for analyzing together two statutes which are not enacted contemporaneously. The statute under consideration was section 206 of the Investment Advisers Act

of 1940, 15 U.S.C. § 80b-6. Justice Stewart reasoned:

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). See *Amtrak*, *supra*, 414 U.S., at 458; *Securities Protection Investment Corp. v. Barbour*, 421 U.S. 412, 419; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471. Congress expressly provided both judicial and administrative means for enforcing compliance with § 206. First, under § 217 willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 203 to impose various administrative sanctions on persons who violate the Act, including § 206. In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action." *Cannon v. University of Chicago*, _____ U.S., at _____ (Powell, J., dissenting).

Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent. *Securities Protection Investor Corp. v. Barbour*, 421 U.S. 412, 419; *Amtrak, supra*, 414 U.S., at 458. But what evidence of intent exists in this case, circumstantial though it be, weighs

against the implication of a private right of action for a monetary award in a case such as this. Under each of the securities laws that preceded the Act here in question, and under the Investment Company Act which was enacted as companion legislation, Congress expressly authorized private suits for damages in prescribed circumstances.[10] For example, Congress provided an express damage remedy for misrepresentations contained in any underwriter's registration statement in § 11(a) of the Securities Act of 1933, and for certain materially misleading statements in § 18(a) of the Securities Exchange Act of 1934. "Obviously, then when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington*, _____ U.S., at _____. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S., at 734; see *Amtrak, supra*, 414 U.S., at 458; *T.I.M.E., Inc. v. United States, supra*, at 471. The fact that it enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability to a private suitor. *See Abrahamson v. Fleschner*, 568 F.2d 862, 883 (Gurfein, J., dissenting).

Transamerica, _____ U.S. at _____, 100 S.Ct. at 247-48. Later in the opinion the Court noted:

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[10] See Securities Act of 1933, §§ 11 and 12, 15 U.S.C. §§77k and 771; Securities Exchange Act of 1934, §§9(e), 16(b), and 18, 15 U.S.C. §§71i(e), 78p(b), and 78r; Public Utility Holding Company Act of 1935, §§15(a) and 17(b), 15 U.S.C. §§79p(a) and 79q(b); Trust Indenture Act of 1939, §323(a), 15 U.S.C. §77www(a); Investment company Act of 1940, §30(f), 15 U.S.C. §80a-29(f).

> Congress amended the Investment Company Act in 1970 to create a narrowly circumscribed right of action for damages against investment advisers to registered investment companies. Act of Dec. 14, 1970 Pub. L. 91-547, § 20, 84 Stat. 1428, 15 U.S.C. § 80a-35(b). While subsequent legislation can disclose little or nothing of the intent of Congress in enacting earlier laws, *see SEC v. Capital Gains Research Bureau*, 375 U.S., at 199-200, the 1970 amendments to the companion Act is another clear indication that Congress knew how to confer a private right of action when it wished to do so.

Id. at 248 n. 13. Apparently then, contemporaneous enactment is not important, at least where there are express remedies in other, related laws.

In the instant case, the Court believes that the creation of a broad enforcement scheme in 1974 (*see* pp. 3-4 *supra*) is an implied rejection of a private cause of action under 7 U.S.C. § 13(b). Any weakness in this conclusion generated by the noncontemporaneous enactment of section 13(b) and the 1974 amendments is cured by the fact that the amendments affected the CEA of which section 13(b) is a part (*see* discussion of *Transamerica, supra*, p. 14); the amendments even made minor alterations in section 13(b).[6] Even more significantly, 7 U.S.C. § 9 was enacted contemporaneously with 7 U.S.C. § 13 in 1922 and 7 U.S.C. § 9

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[6] The 1974 amendment substituted a $100,000 fine for the existing $10,000 fine. Pub. L. 93-463, Title II, § 212(d)(2), 88 Stat. 1404 (1974). The 1978 amendment increased the maximum penalty to $500,000, although maintaining it at $100,000 for individuals. Pub. L. 95-405 §19(2), 92 Stat. 875 (1978).

does apply to price manipulation. This limited remedy in 7 U.S.C. § 9 should be deemed to exclude a private remedy for price manipulation.

In *Borak*, it should be recalled, the Court implied a private cause of action from a broad jurisdictional statute. 377 U.S. at 430-31; *see* p. 6, *supra*. Plaintiffs here also rely on a jurisdictional statute. In *Touche Ross* the Court expressly repudiated *Borak's* reliance on a jurisdictional statute, reasoning that the jurisdictional statute "creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the Act which they seek to enforce, not in the jurisdictional provision." _____ U.S. at _____, 99 S.Ct. at 2490. *See also* the discussion of jurisdiction and implied causes of action, *supra* p. 5. The jurisdictional statute involved here, 7 U.S.C. § 2, provides in pertinent part:

> [T]he Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time con-

ferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission or other regulatory authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

Courts have held that the addition of the last quoted sentence in 1974 refutes any indication that Congress did not intend an implied cause of action and that the first quoted sentence only refers to *exclusive administrative* jurisdiction. *E.g.*, *Smith v. Groover*, 468 F. Supp. at 114; *Hofmayer*, 459 F. Supp. at 737. Even assuming that this view is correct (which seems improbable in view of the discussion on p. 5 *supra*) this Court believes the amendment to 7 U.S.C. § 2 insufficient to overcome the other factors discussed herein.

3. *Purpose of legislative scheme*

The Supreme Court has not, since *Cort*, significantly furthered the understanding of this factor; two recent cases fail to give it any independent significance. *Transamerica*, _____ U.S. at _____, 100 S.Ct. at 249; *Touche Ross*, _____ U.S. at _____, 99 S.Ct. at 2489.

One factor cited by some courts in support of implying a private cause of action under the CEA is the view of the CFTC that the courts should do so. *Berenson*, 2 Comm. Fut. L. Rep. at p. 22978; *Hofmayer*, 459 F. Supp. at 738. While agencies entrusted with the en-

forcement of statutes are entitled to deference in the construction of those statutes, the courts are peculiarly able to answer such a question as is presented here. *Piper*, 430 U.S. at 41 n. 27.

In addition, plaintiffs maintain that Urner Barry is not subject to the administrative jurisdiction of the CFTC because Urner Barry is not involved in commodities futures trading and that as a result the implication of a private cause of action would be consistent with the commodities legislative scheme. Plaintiffs in this action, however, urge that the prohibition against price manipulation in 7 U.S.C. § 13(b) applies to Urner Barry. The CFTC may control price manipulation. 7 U.S.C. §§ 9, 13a-1, 18.[7] *See* p. 4 *supra*.

4. *State law*

The defendant Urner Barry has conceded that in this case the fourth factor has no relevance (defendant's brief of October 30 at p.8 n.3).

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[7] Section 18 applies to Urner Barry because it is required to be and is registered with the CFTC under 7 U.S.C. §6m. It is required to be and is registered because it is a "commodity trading advisor," defined in 7 U.S.C. ¶ 2 as:

> any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings as to the value of commodities . . . or who for compensation or profit, and as part of a regular business issues or promulgates analyses or reports concerning commodities. . . .

The plaintiffs complain, without supporting authority, that Urner Barry did not register until November 9, 1979 — after filing the instant motion to dismiss.

III. Primary jurisdiction

Defendant also urges dismissal of all counts (see note 1 *supra*) under the doctrine of primary jurisdiction, relying upon *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113 (1973), and *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973). Defendant contends that the complexity of this case and the need for uniform treatment of the entire egg industry dictate this result. For the reasons stated below the Court will DEFER RULING on this aspect of the motion. First, the Court does not possess a clear enough understanding of the nature of the dispute between the parties, and the understanding which the Court does have is based on an unrecorded oral argument and not a factual record. The Court comprehends generally that Urner Barry believes this dispute to be a complex one, requiring the sort of technical and consistent guidance which a single agency can provide better than many different trial courts; plaintiffs, on the other hand, consider this dispute to be much like a typical fraud case. Although the Court presently views the dispute as one involving issues more technical than and requiring more uniform treatment than a typical fraud case, the Court will not rule upon this aspect of the motion absent a record which demonstrates that this is or is not a case requiring administrative expertise and uniformity.

Second, the Court notes the rather peculiar manner in which Urner Barry has stated its alternative grounds for this motion. In brief and in oral argument, it has emphasized the implied cause of action issue which concerns only Count I over the primary jurisdiction issue which concerns plaintiffs' whole case.

The Court is not sure Urner Barry will still want to dismiss or stay the rest of the case, given the Court's ruling on the implied cause of action issue. Indeed, the Court can readily understand that even the plaintiffs might, if permissible, want to take Counts II and III to the CFTC should they pursue a remedy there under 7 U.S.C. § 13(b).

Accordingly the Court will DEFER RULING on the motion to dismiss Counts II and III.

Urner Barry's Motion to Compel

In its motion to compel, defendant states that its counsel have met with counsel for plaintiffs in an attempt to resolve discovery disputes. Related disputes have been settled, but three separate disputes have been submitted to the Court.

A. *Interrogatory Number Nine*

The first dispute involves defendant's interrogatory number nine which asks:

> Identify all persons that have contributed, are contributing, have promised to contribute, are expected to contribute, or have been asked or have volunteered to contribute to the payment of the expenses of prosecuting this action by plaintiffs, and for each such person, state the full details concerning said persons' actual or prospective contribution and identify all data relating thereto.

In objection plaintiffs state:

> This interrogatory requests information that is

neither relevant nor likely to lead to the discovery of admissible evidence.

In a supplemental response plaintiffs further state:

> Clarendon[8] continues to object to this interrogatory for the reasons set forth in its first response to these Interrogatories. To the extent that Defendant contends that this interrogatory seeks information relevant to Defendant's counterclaim, Clarendon objects to such discovery because the counterclaim cannot be maintained for the reasons set forth in the Counterclaim Defendants' Motion for Partial Summary Judgment. Clarendon further objects to this interrogatory on the grounds that to provide Urner Barry with this information would violate Plaintiffs' First Amendment right of association and would have a chilling effect on this lawsuit due to Urner Barry's complete dominance over the market for egg price quotation services and because of Urner Barry's ability to determine, in a wholly unfettered fashion, who it will contact in the course of its egg market canvass.

Urner Barry argues that interrogatory number nine seeks discovery relevant in several ways: (1) the contributors to the litigation fund may be co-conspirators, (2) the contributors to the litigation fund may have discoverable knowledge of plaintiffs' alleged price-fixing and their motivation in filing this action, (3) one or more of the contributors may be a real party in interest, and (4) the contributors may be in privity

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[8] Clarendon is one of the plaintiffs; all of the plaintiffs except Kimsey responded in a like manner.

with present plaintiffs, thereby affecting the res judicata effects of any decree entered in this action. The plaintiffs contest each argument made by defendant. Because the Court agrees with the first argument, it need not treat the others. Plaintiffs also urge the Court to delay ruling until after it rules on plaintiffs' motion for partial summary judgment. In that motion plaintiffs seek dismissal of certain allegations by defendant on the grounds that they run afoul of the "*Noerr - Pennington*" doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) and *UMW v. Pennington*, 381 U.S. 657 (1965). Because the Court can rule on the motion to compel without regard to the merits of that motion, it need not delay ruling.

In support of its motion defendant cites *Uinta Oil Refining Co. v. Continental Oil Co.*, 226 F. Supp. 495, 500 (D. Utah 1964), where another district court stated:

> Interrogatory 130 asks for the name of persons sharing in the costs of the litigation. The plaintiffs' assertion that the disclosure of this information will enable defendants to intimidate or penalize plaintiffs' supporters is not sufficient to preclude an otherwise proper inquiry. Especially in the sensitive atmosphere of pending antitrust litigation intimidations are not to be lightly presumed, and adequately can be dealt with otherwise should the necessity arise. The requested information may have some bearing upon motives, credibility, damages and relevant relationships within the industry.

This Court need not even go as far as *Uinta* in find-

ing that the interrogatories seek "information [which] appears reasonably calculated to lead to the discovery of admissible evidence," (Fed. R. Civ. P. 26(b)(1)), because the discovery here is calculated to ascertain the identity of persons who might be joined as defendants to Urner Barry's counterclaim. Plaintiffs contend, however, that allowing such discovery will enable Urner Barry to retaliate against those persons whose identity it discovers, thereby chilling the First Amendment rights of plaintiffs and their financial supporters. In reply, Urner Barry argues that it cannot effectively retaliate even if it so desires. The Court believes that plaintiffs have not demonstrated that Urner Barry can effectively retaliate against plaintiffs and their financial supporters without simultaneously harming its other customers and ruining its integrity. Significantly, plaintiffs do not even contend that defendant has taken any steps to retaliate against those persons whose identity it already knows. Accordingly, the Court concludes that the remote chance of retaliation is not a reason to deny the discovery request, and ORDERS that the discovery be granted.

B. *Interrogatory Number Eleven*

Interrogatory number eleven requests:

> For each trade association or group identified in your answer to the preceding interrogatory, identify all members thereof and identify all documents relating thereto concerning each Plaintiff's participation or membership therein.

The "preceding interrogatory" referred to interrogatory number ten which requested that plaintiffs iden-

tify each trade association in which they are involved. Originally plaintiffs objected to number eleven on the same grounds as number nine; they have supplemented their response as follows:

> Clarendon does not know the identity of all members of the entities referenced in its answer to the prior interrogatory. Clarendon does know that the only direct members of United Egg Producers are National Egg Company, Northeastern Egg Marketing Association, Midwest Egg Producers, Northwest Egg Producers West Egg Company, and Southern California Egg Cooperative. Clarendon continues to object to this interrogatory to the extent that it requests Clarendon to identify documents for the reasons set forth in Clarendon's original objection to this interrogatory.

Trade association activities are of paramount concern in cases involving allegations of a conspiracy to fix prices, and as such are discoverable. Accordingly, the Court ORDERS that interrogatory number eleven be answered.

C. *Request for Production Number Two*

Urner Barry's request for production number two asks for "[a]ll Federal and State income tax returns filed by each plaintiff during each year beginning with 1973 to the present." In response plaintiffs referred to their objection to interrogatory number nine. *See* p. 19 *supra*. Urner Barry contends that tax returns are relevant to, among other issues, any damages plaintiffs might seek. Plaintiffs deny the relevancy of the tax returns. In *Keco Industries, Inc., v. Stearns*

Electric Corp., 285 F. Supp. 912, 913 (E.D. Wis. 1968), the district court observed, "Plaintiff . . . maintains simply that 'too many factors and considerations are present in a year of business and production for the total income as reported for tax considerations to be pertinent to any particular matter.' To some extent this is true." The court nevertheless concluded: "But this court still believes that the tax returns may shed some light on the damage issue, that they may at least 'lead to the discovery of admissible evidence. . . .' " The *Keco* court did not indicate *how* it would lead to discovery of admissible evidence, and defendant has made no such showing here either with respect to proof of loss of profits, domicile, or real parties in interest. Any of those matters can be discovered in numerous other ways.

Further, plaintiffs correctly urge the Court to recognize that the case law establishes a public policy against disclosure of tax returns. *E.g. Carlson Companies, Inc. v. Speery & Hutchinson Co.*, 374 F. Supp. 1080, 1084-85 (D. Minn. 1974), *rev'd on other grounds*, 507 F.2d 959 (8th Cir. 1979); *Richland Wholesale Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 40 F.R.D. 480, 482-83 (D. S.C. 1966); *Cooper v. Hallgarten & Co.*, 34 F.R.D. 482, 483 (S.D.N.Y. 1964). (Two of the cases cited by plaintiffs recognize the need for discovery of tax returns of one claiming damages. *Carlson*, 374 F. Supp. at 1080; *Richland*, 40 F.R.D. at 482.) The Court concludes that the relevance of tax returns is minimal at best and that, moreover, the policy against disclosure of tax returns forbids their discovery absent a showing of particular need. No such showing has been made here; thus the Court

ORDERS that the Request for Production No. 2 need not be complied with.

Although defendant has urged the Court to award it attorney fees and costs for bringing this motion, and although such an award is sometimes permissible, Fed. R. Civ. P. 37(a)(4), the Court DENIES the request here because it finds the opposition "substantially justified," Fed. R. Civ. P. 37(a)(4).

Plaintiffs' Motion For Summary Judgment

The plaintiffs' motion for summary judgment presents two independent questions of antitrust law. First, plaintiffs contend that they are entitled to summary judgment on defendant's damage claims for price-fixing on the grounds that defendant is not a "direct purchaser" from plaintiffs, relying upon *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Second, plaintiffs argue that they are entitled to summary judgment to the extent that defendant has alleged that they have violated the antitrust laws by bringing a lawsuit. For this proposition the plaintiffs rely on the "*Noerr-Pennington* doctrine" which derives from *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *UMW v. Pennington*, 381 U.S. 657 (1965). Urner Barry and plaintiffs have responded to the Court's order of September 18, 1979, that Urner Barry show cause why the Court should not presently rule on plaintiffs' motion for summary judgment.

A. *Noerr-Pennington*

As to the *Noerr-Pennington* defense, Urner Barry

has argued that the motion is really one to dismiss because plaintiffs have "not relied upon any depositions, answers to interrogatories, admissions, or affidavits to show that there is no genuine issue as to any material fact." In their statement of material facts, plaintiffs indeed do rely on such evidence. Whether that evidence creates a genuine dispute as to a material fact is, of course, a different question—indeed, it is precisely the question presented by the motion for summary judgment. Alternatively, defendant Urner Barry contends that the motion should not be ruled upon until it obtains the discovery which was the subject of the motion to compel discussed above. Plaintiffs' main argument to the contrary is that defendant has failed to actively pursue discovery. In that regard the Court observes that plaintiffs consented on August 21, 1979, to an extension of discovery through February 20, 1980 and that the Court by Order of February 25, 1980 granted a further extension over the opposition of plaintiffs. The Court was informed at oral argument on January 8, 1980 that discovery has been delayed during the time the Court has had these motions under advisement. Because defendant's motion to compel has been granted, because plaintiffs have agreed to an extension of discovery, and because discovery has been further extended, the Court will DEFER RULING on the *Noerr-Pennington* aspect of the motion for summary judgment until after the termination of discovery. *See* Fed. R. Civ. P. 56(f). Further, it appears that the *Noerr-Pennington* aspect of the motion would affect only a small portion of the defendant's counterclaim — *i.e.* the allegations that plaintiffs' filing of the lawsuit is illegal. Moreover, defendant has argued, apparently without opposition, that the filing of the lawsuit may be used as evidence even if it is exempt as

an independent basis for antitrust liability. *See e.g., UMW v. Pennington*, 381 U.S. 657, 670 n. 3; *Feminist Women's Health Center, Inc. v. Mohamad*, 586 F.2d 530, 543 n. 7 (5th Cir. 1978); *United States v. Southern Mtr. Carriers Rate Conf.*, 439 F. Supp. 29, 47 (N.D. Ga. 1977). Finally, these issues would become moot, if plaintiffs were to move successfully for complete summary judgment at the close of discovery.

B. *Illinois Brick*

As to the *Illinois Brick* defense, the parties agree that the motion is ripe for ruling. It is not disputed that defendant is not an indirect purchaser from plaintiffs. A careful reading of *Illinois Brick* reveals that the case has no application to the instant case. In *Illinois Brick* the Supreme Court held that indirect purchasers could not sue manufacturers for damages from price-fixing. The rationale of *Illinois Brick* turned on the Supreme Court's previous decision in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), that an antitrust defendant could not reduce his liability by showing that direct-purchaser plaintiffs had "passed-on" their injury to indirect purchasers. The Court reasoned that to permit litigation over the "pass-on" concept would create a risk of multiple liability, *Illinois Brick*, 431 U.S. at 730, and overly complicate proof of damages.[9] *Id.* at 73-33; *Hanover Shoe*, 392 U.S. at 492-93.

This brief discussion of *Illinois Brick* and its reliance on *Hanover Shoe* indicates that *Illinois Brick* has no

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[9] *Illinois Brick* expressly did not deal with "standing." 431 U.S. at 728 n.1.

significance other than for "indirect purchasers." To hold, as plaintiffs request, that "[o]nly direct purchasers . . . have standing" would deprive anyone outside a chain of distribution of the right to sue for antitrust damages for price-fixing. Judge Wisdom has described *Illinois Brick* in a manner entirely inconsistent with such an argument:

> The *Illinois Brick* decision rested on avoidance of overlapping liability and on concern about the complexities and uncertainties of proof that would attend general recognition of passing-on theories of damage. What is critical is not whether a defendant competes in the relevant industry but whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory.

431 U.S. at 728, p. 7. *In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1160 (5th Cir. 1979). For the foregoing reasons the Court DENIES the motion insofar as it relies upon *Illinois Brick*.

The Court requested by telephone that the parties argue the application to this case of traditional standing principles. Plaintiffs submitted a brief and both parties argued the point at oral argument. The Court hereby ORDERS defendant to respond to that brief in writing within fifteen (15) days. Plaintiffs may reply within fifteen (15) days thereafter.

SUMMARY

Following is a summary of the actions taken by the Court herein: (1) the Court GRANTS defendant's motion to dismiss only as to Count I and DEFERS

RULING on the motion to dismiss as to Counts II and III; (2) the Court GRANTS defendant's motion to compel as to interrogatories numbers nine and eleven and DENIES the motion as to request for production number two; and (3) the Court DEFERS RULING on plaintiffs' motion for summary judgment with respect to the *Noerr-Pennington* issue, DENIES the motion with respect to the *Illinois Brick* issue, and DEFERS RULING with respect to the standing issue.

SO ORDERED, this 27th day of March, 1980.

CHARLES A. MOYE, JR.
United States District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SUNNYSIDE EGGS, INC., *et al.*,	:	CIVIL ACTION
Plaintiffs,	:	FILE NO. C78-1661A
v.	:	
URNER BARRY PUBLICATIONS, INC.	:	
Defendant.	:	

ORDER

Presently pending in this case are several matters. First, pursuant to this Court's order of February 26, 1980, the parties filed on May 22, 1980, a joint statement setting forth their positions on the Court's order of January 31, 1980, in which defendant Urner Barry Publications, Inc. was directed to compensate plaintiffs for the reasonable costs of (1) their opposition to defendant's motion for protective order of January 28, 1980, and (2) the rescheduling of certain depositions. Second, the Court has before it plaintiffs' motion for reconsideration of the Court's order of March 27, 1980, in which the Court granted defendant's motion to dismiss as to the cause of action allegedly arising under the Commodity Exchange Act. In addition, the Court continues to be confronted with those issues on which it deferred ruling in its March 27, 1980 order, namely (1) defendant's motion to dismiss as to Counts II and III of plaintiffs' complaint; (2) plaintiffs' motion for summary judgment with respect to the *Noerr-Pen-*

nington issue; and (3) plaintiffs' motion for summary judgment with respect to the standing issue.

Considering first the matter of attorneys' fees and costs arising out of defendant's motion for protective order, the Court notes that plaintiffs' initial request was for $700.75 and their amended request in a letter to defendant's counsel was for $706.55. The initial amount included $683.50 for attorneys' fees and $17.25 for costs, while the amended request was higher because an additional telephone call in the amount of $5.80 was added. The defendant opposed this amount as excessive and in its order of February 26, 1980, the Court ordered the parties to submit a single joint document to the Court outlining their positions if they could not agree on an amount. Finding themselves unable to agree, the parties submitted a joint statement under seal on May 22, 1980. Without breaching the confidences of the materials under seal, the Court will consider the matters filed in that document.

On January 28, 1980, defendant filed a motion for protective order postponing the taking of two depositions which had been noticed by plaintiffs. The defendant wished the depositions postponed until the defendant's motion to dismiss and the plaintiffs' motion for summary judgment could be ruled upon by the Court. The defendant filed a three page brief in support of its motion, citing four cases therein, to which plaintiffs responded one day later with a five page brief in which no cases were cited as authority. While the Court agreed that the motion of defendant should be granted, because the motion was filed less than ten days prior to the scheduled depositions, preventing plaintiffs from utilizing their full ten days to respond,

the Court ordered costs and attorneys' fees to be assessed against defendant.

Plaintiffs' counsel, in a letter to defendant's counsel dated March 4, 1980, and filed as Exhibit A to the joint statement referred to above, stated that review of defendant's motion and the preparation of a response thereto required the work of four attorneys for 9.6 hours and of one paralegal for 2 hours, for a total of $683.50 in fees. Plaintiffs argue that this amount of time was reasonable because it was necessary for each attorney to review all pleadings in the matter and to spend some time in conference discussing responses to pleadings and in reviewing drafts of those pleadings.

Defendant argues that the twelve factors of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which establish guidance for setting attorneys fees in employment discrimination cases are applicable or at least of assistance here. While the plaintiffs cited three cases which they claimed held *Georgia Highway Express* to be inapplicable to this dispute, the Court does not read those cases as prohibiting it from considering the *Georgia Highway Express* factors in setting a reasonable fee here. Those factors are:

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or other circumstances; (8) The amount involved and the results

obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases.

488 F.2d at 717-19.

The Court believes that 9.6 hours of work by four attorneys and two hours of work by one paralegal is excessive to review a three page brief and file a five page response to a motion for protective order. The question presented was not difficult or novel. While the response did have to be hurriedly compiled, the time limitation involved would not require the work of four attorneys, one of whom by the plaintiffs' own admission merely reviewed final drafts and insured proper and timely filing of the response.

The Court finds that the fee charged by the attorney who was the principal individual involved with this matter on behalf of plaintiffs according to the letter he wrote to defendant's counsel on March 4, 1980, is the only reasonable attorney's fee which should be assessed against defendant. Therefore, the Court hereby DIRECTS defendant to pay plaintiffs $366.00 in attorney's fees and $23.05 in costs, for a total of $389.05 This amount is lower than the $706.55 requested by plaintiffs and higher than the $240.00 offered by defendant; the Court feels it is a reasonable amount for the services rendered.

The Court next considers plaintiffs' motion for reconsideration of this Court's order of March 27, 1980, in which the Court refused to find an implied private

cause of action under a criminal provision of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* As the Court recently noted in *Westlake v. Abrams*, ____ F. Supp. ____ (N.D. Ga. 1980) (No. C78-555A, filed December 1, 1980), the question of whether an implied private cause of action arises under the Commodity Exchange Act should soon be answered by the Fifth Circuit Court of Appeals in the case of *Rivers v. Rosenthal & Co.*, Civ. Action File No. CV178-186 (S.D. Ga. 1978), appeal pending, 79-1313 (5th Cir.). The case was heard on oral argument June 4, 1980, by Judges Kravitch, Reavley, and Henderson. Since the forthcoming decision in *Rivers* may lend guidance to this Court in interpreting plaintiffs' claims under 7 U.S.C. § 13(b), the Court will today DEFER RULING on plaintiffs' motion for reconsideration until such time as *Rivers* is decided.

Remaining before the Court is the defendant's motion to dismis as to Counts II and III of plaintiffs complaint and plaintiffs' motion for summary judgment with respect to the *Noerr-Pennington* issue and the standing issue. The Court deferred ruling on these matters in its March 27, 1980 order, and in light of ongoing settlement negotiations will continue to DEFER RULING on those motions until after the close of discovery. Upon the joint application of counsel for nine plaintiffs and counsel for defendant discovery was again extended on November 20, 1980, through and including January 27, 1981.

SO ORDERED, this 8 day of December, 1980.

CHARLES A. MOYE, JR.
United States District Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SUNNYSIDE EGGS, INC., *et al.*,	:	CIVIL ACTION
Plaintiffs,	:	FILE NO. C78-1661A
vs.	:	
URNER BARRY PUBLICATIONS, INC.	:	
Defendant.	:	

ORDER

Presently before the Court in this matter are two issues due the Court's consideration. First, the Court must consider objections by the National Egg Company (NECO) to a subpoena duces tecum dated November 7, 1980, served by defendant Urner Barry Publications, Inc.[1] Second, the Court must decide whether to continue to defer ruling on plaintiffs' motion for reconsideration of this Court's order of March 27, 1980, in which the Court refused to find an implied cause of action to exist under the Commodity Exchange Act.

The subpoena of which NECO complains seeks numerous documents held by National Egg Company, some of which are over twenty years old. NECO has stated both general and specific objections to the subpoena. The general objections are aimed at each

[1] Because the subpoena has not been filed, it is attached hereto as an appendix.

paragraph of the subpoena while the specific objections all complain that (1) specific portions of the subpoena seek information that is neither relevant nor calculated to lead to the discovery of admissible evidence; (2) the particular request is overly broad, and (3) the request is burdensome and oppressive.

NECO has agreed to produce the documents sought in paragraphs 2, 4, 5, 6, 8, 11, 12 and 14 subject to its general objections to producing (1) any documents protected by the attorney-client privilege of work product immunity; (2) confidential or commercially sensitive documents, provided, however, that NECO will not assert such obligation upon wirtten assurances from counsel for the parties that the confidentiality of NECO's documents will be maintained; (3) documents for time periods which are not the subject of this litigation. As to paragraphs 1. 3, 7, 9, 10, and 13, NECO asserts the above general objections as well as the specific ones outlined above.

Having examined the subpoena, the Court agrees that it is possible the documents requested in paragraphs 1, 3, 7, 9, 10, and 13 seek numerous documents some of which may not be relevant nor calculated to lead to the discovery of admissible evidence. Those paragraphs seek all minutes, summaries, reports, recordings, transcripts and other records of any meeting of NECO, of its diretcors, or of any committee of NECO from January 1, 1970 to present; all newsletters, magazines and reports from NECO to its members from January 1, 1960, to present; documents showing all members of NECO from January 1, 1977 to present; numerous documents relating to NECO's involvement with egg price control; all correspondence

between NECO and 17 other corporations and agencies over the past six years; and documents showing all rules, bylaws, regulations, and policies governing NECO from the date of its formulation to present. The production of all these documents may be extremely costly and it is possible that much of the expenditure would be wasted on irrelevant material. Consequently, the Court will GRANT NECO's motion to quash the subpoena as to paragraphs 1, 3, 7, 9, 10 and 13, but will allow Urner Barry Publications, Inc. to issue another subpoena seeking all or portions of these documents if it files the subpoena with the Clerk within twenty days of this order and in connection therewith files a memorandum of law stating with specificity the materiality and relevancy to this action of each document sought. NECO has offered to deliver to Urner Barry the documents sought by paragraphs 2, 4, 5, 6, 8, 11, 12 and 14 of the subpoena subject to its general objections and has requested an advancement for costs of $500.00. The Court orders NECO to provide a schedule of anticipated costs which it believes the production of these documents will cause it to incur. Upon receipt thereof, the Court will consider the motion for advancement of costs as well as the motion to quash the production of those documents for which a general objection has been raised.

The Court now turns to plaintiffs' request that the Court continue to defer ruling on plaintiffs' motion for reconsideration of this Court's order of March 27, 1980. The basis of the plaintiffs' request is that although the Fifth Circuit has recently found the absence of any implied cause of action under 7 U.S.C. §§ 6b, 6k (the Commodity Exchange Act) in *Rivers v. Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), the

United States Supreme Court has granted certiorari in the case of *New York Mercantile Exchange v. Leist*, 49 U.S.L.W. 3617 (February 24, 1981), a case wherein the Second Circuit found an implied cause of action under 7 U.S.C. §§ 6b, 7(d), 7a(8) and 13(b). *See Leist v. Simplot*, _____ F.2d _____ (2d Cir. 1980). Because the case before this Court involves section 13(b), the plaintiff argues that the Court should not again deny a cause of action to exist thereunder following *Rivers*, but should await the Supreme Court's ruling in *Leist*.

Because discovery continues in this matter, as evidanced by the discussion involving a subpoena above, settlement negotiations continue, and *Leist* remains to be decided, the Court today will again DEFER RULING on the plaintiffs' motion for reconsideration of the Court's order of March 27, 1980, dismissing Count I of the complaint.

SO ORDERED, this 23rd day of March, 1981.

CHARLES A. MOYE, JR.
United States District Judge

MOTION FILED
APR 10 1981

No. 80-757
(Consolidated with Nos. 80-895 and 80-936)

In the
Supreme Court of the United States
OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,

Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION OF TEN UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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April 9, 1981

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No. 80-757
(Consolidated with Nos. 80-895 and 80-936)

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,

Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

MOTION OF TEN UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF AMICI CURIAE

The EXCHANGES[1] respectfully move, pursuant to Rule 36 of this Court, for leave to file the accompanying

---

[1] Board of Trade of the City of Chicago; Board of Trade of Kansas City, Mo., Inc.; Chicago Mercantile Exchange; Citrus Associates of the New York Cotton Exchange, Inc.; Coffee, Sugar & Cocoa Exchange, Inc.; Commodity Exchange, Inc.; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; New Orleans Commodity Exchange; and New York Cotton Exchange. (The New Orleans Commodity Exchange was not a designated contract market in December 1980 and, therefore, did not participate in the EXCHANGES' earlier brief).

brief *amici curiae* in support of the petitioners. Certiorari was granted on February 23, 1981, as was the EXCHANGES' December 19, 1980 motion for leave to file a brief *amici curiae* in support of the petition.

The petitioners have again consented to the EXCHANGES' appearance as *amici curiae*. The respondents have again refused such consent.

At issue before the Court is whether the Second Circuit erred when it held in a two-to-one decision that a private cause of action for damages may be implied against a commodity exchange and its officials for alleged violations of the Commodity Exchange Act (7 U.S.C. §§1-25).

The EXCHANGES, like the petitioner New York Mercantile Exchange, are federally-designated commodity exchanges on which futures contracts may be lawfully traded in the United States. Over 90 million futures contracts were traded through their facilities in 1980 alone. By virtue of the size, scope, and importance of the EXCHANGES' international markets, and the accompanying duty to police those markets, their vulnerability to private suits is enormous and the potential impact devastating.

The decision of the Second Circuit immediately and directly affects several of the EXCHANGES. For example, the Chicago Board of Trade and the Commodity Exchange, Inc., are defendants in an action pending in the United States District Court for the Southern District of New York (*Selig Strax* v. *Commodity Exchange, Inc., et al.*, No. 79 Civ. 5366) in which damages of more than one billon dollars are sought against

these exchanges for alleged violations of the Commodity Exchange Act.[2]

As outlined in our earlier brief in support of the petition, important aspects of the pertinent legislative history and the legislative scheme, critical to proper determination of the question raised in this case, simply were not considered by the Second Circuit. The EXCHANGES believe that our analysis of these aspects, which we highlighted in our earlier brief but which were not addressed in the petition, would be of material aid to the Court.

---

[2]Additionally, Citrus Associates of the New York Cotton Exchange, Inc. is a defendant in an action pending in the Southern District of New York, predicated on alleged violations of the Commodity Exchange Act, which seeks damages against the Citrus Associates in the amount of 5 million dollars. *Nancy Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc., et al.*, No. 78 Civ. 178. Commodity Exchange, Inc., is a defendant in another action pending in the Southern District of New York, also predicated on alleged violations of the Commodity Exchange Act, which seeks damages against the Exchange in excess of 100 million dollars. *Republic National Monetary Corp.* v. *Commodity Exchange, Inc., et al.*, No. 80 Civ. 5397. Also, the Chicago Board of Trade is a defendant in two actions pending in the Northern District of Illinois, predicated on alleged violations of the Commodity Exchange Act, which seek damages against the Board in excess of 5.6 million dollars. *Philip Smith* v. *Richard Groover, et al.*, No. 77 C 2297; *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.*, No. 80 C 1111.

WHEREFORE, the EXCHANGES respectfully request this Court for leave to file their brief *amici curiae* submitted herewith.

Respectfully submitted,

.....

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April 9, 1981

QUESTION PRESENTED

Whether it was the intent of Congress that federally-designated commodity exchanges and their officials, which operate and act under pervasive federal regulation and are subject to severe penalties and sanctions for noncompliance with their duties under the Commodity Exchange Act, and which have been specifically exempted or excluded from every provision of the Act creating private causes of action for damages, should nevertheless be subject—by implication alone—to private damage claims under section 5(d), 5a(8), or 9(b) of the Act [7 U.S.C. §7(d), 7a(8), or 13(b)].

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-757

(Consolidated with Nos. 80-895 and 80-936)

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,

Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF AMICI CURIAE OF TEN UNITED STATES COMMODITY EXCHANGES IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of the EXCHANGES,[1] as *amici curiae,* in support of the petitioners, whose petition for writ of certiorari was granted on February 23, 1981.[2]

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[1] See note 1 of the accompanying Motion.

[2] The Court's Order of February 23, 1981 also granted the EXCHANGES' December 19, 1980 motion for leave to file a brief *amici curiae* in support of the petition.

The petitioners New York Mercantile Exchange and its officials seek reversal of the decision in *New York Mercantile Exchange* v. *Leist*, 638 F.2d 283 (2d Cir. 1980), where the Second Circuit held in a two-to-one decision that federally-designated commodity exchanges and their officials may be sued for unlimited damages for alleged violations of the Commodity Exchange Act (7 U.S.C. §§1-25).

The Second Circuit arrived at this far-reaching result notwithstanding the fact that the Act does not provide for any such private suit; nothing in the pertinent legislative history evidences any congressional intent whatsoever to create, by implication, private causes of action against exchanges and their officials; and, to the contrary, Congress has assiduously avoided creating such causes of action on numerous occasions, beginning with its earliest legislative actions in 1921 and as recently as the latest revision of the Act in 1978.

Subsequent to the Second Circuit's decision, and prior to the Court's order granting certiorari, the United States Court of Appeals for the Fifth Circuit rejected the Second Circuit's analysis, holding that a private cause of action against a commodity brokerage firm cannot be implied under the Commodity Exchange Act. *Rivers* v. *Rosenthal & Company*, 634 F.2d 774 (5th Cir. 1980), *petition for cert. filed*, No. 80-1542. Although *Rivers* does not expressly address the question of exchange and exchanged-related liability under the Act, its reasoning clearly applies a *fortiori* to this case.

NATURE AND INTEREST OF THE EXCHANGES

The EXCHANGES, like the petitioner New York Mercantile Exchange, are federally-designated commodity ex-

changes on which futures contracts may be lawfully traded in the United States. By law (the Commodity Exchange Act) such trading may be conducted only by and through members of these eleven exchanges, as well as the recently designated New York Futures Exchange (a subsidiary of the New York Stock Exchange), in accordance with exchange rules and the provisions of the Commodity Exchange Act. (See 7 U.S.C. §§6, 6b, 6c, 6h.)

Located in Chicago, Kansas City, Minneapolis, New Orleans, and New York City, the EXCHANGES operate as not-for-profit institutions to provide international markets for futures trading in agricultural and forest products, metals, rubber and petroleum products, foreign currencies and financial instruments. Thousands of producers and commercial users of these commodities throughout the world avail themselves of the EXCHANGES' diverse markets. In 1980, over 90 million contracts were traded on the EXCHANGES, representing billions of dollars worth of commodities.[3]

As duly designated "contract markets" under the Commodity Exchange Act, the EXCHANGES' mandated activities are not those of private commercial ventures. Since the enactment of a federal futures trading law in 1921, Congress has assigned to commodity exchanges the duty to police their marketplaces and to act as supplements to the federal government in achieving the public-protection objectives of the law (now the Commodity Exchange Act). By virtue of the size, scope and importance of their markets, and the accompanying duty to

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[3] "The importance of futures trading to the general public and to the Nation equals the importance of the securities markets." [Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 19 (1974)].

police those markets, the EXCHANGES' vulnerability to private damage suits is enormous, and the impact is potentially devastating.[4]

SUMMARY OF ARGUMENT

Private causes of action against commodity exchanges and their officials are not expressly provided for in the Commodity Exchange Act. Nor is there any persuasive evidence that Congress intended to create such causes of action by implication. A thorough review of the legislative history of the pertinent sections of the Commodity Exchange Act demonstrates that Congress has never expressed any intention to implicitly create such private causes of action.

To the contrary, Congress has assiduously avoided doing so on a number of occasions, and has insulated commodity exchanges and their officials from the only private causes of action expressly provided for in the Act. Moreover, implying such causes of action would frustrate the legislative scheme of the Act, a result which Congress most certainly could not have intended.

Thus, as recognized by the Fifth Circuit in the *Rivers* case [634 F.2d 774 (1980)], the decision of the Second Circuit is irreconcilable with the decisions of this Court, most particularly the recent decisions in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979); *Kissinger* v. *Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980); and *Universities Research Association, Inc.* v. *Coutu,* 49 U.S.L.W. 4354 (April 6, 1981).

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[4] Pending litigation against the EXCHANGES under the Commodity Exchange Act is detailed at note 2 (and preceding text) of the Motion accompanying this brief.

ARGUMENT

Congress Did Not Create, and Did Not Intend to Create by Implication, A Private Cause of Action Under Section 5(d), Section 5a(8), Or Section 9(d) of the Commodity Exchange Act against A Commodity Exchange and Its Officials.

The "central inquiry" and "dispositive question" in determining whether a private cause of action exists under a particular statutory provision is "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979).[5]

Sections 5(d), 5a(8), and 9(b) of the Commodity Exchange Act [7 U.S.C. §§7(d), 7a(8, 13(b)][6] create no express private causes. The Commodity Exchange Act nowhere else provides for such causes against a commodity exchange and its officials, but does expressly provide other means for judicial and administrative enforcement. Thus,

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[5] See also *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980).

[6] Section 5(d) requires, as a condition for licensing a commodity exchange as a "contract market," that the exchange's governing board provide for "the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators" upon such exchange. Section 5a(8) requires, as a further condition for licensing, that each contract market enforce its rules relating to contract terms and other trading requirements which have been approved by the Commodity Futures Trading Commission ("CFTC"). Section 9(b) makes it a felony, *inter alia*, to manipulate or attempt to manipulate commodity prices.

the question is whether Congress intended to create any such cause *by implication.* Such intent must be demonstrated by "persuasive evidence," and in this connection, the focus must be on Congress' intent *at the time the particular statutory provision in question was enacted. Redington,* 442 U.S. at 571, 575 n. 16, 576; *Transamerica Mortgage,* 444 U.S. at 20.

The majority in *Leist* failed altogether to follow this analytical approach and, instead, relied substantially on certain lower court decisions rendered prior to 1974 to advance the proposition that private causes are to be implied *generally* under the Commodity Exchange Act. See 638 F.2d at 300. *Not one of these earlier decisions analyzed the pertinent legislative history.* To the extent a rationale was advanced by them for implying a private cause, it is the long-repudiated test of the *Restatement of Torts.*

The following analysis of the legislative histories of sections 5(d), 5a(8), and 9(b) of the Commodity Exchange Act—as well as subsequent legislation amending the Act in 1974 and 1978, and the overall scheme of the Act—clearly establishes that Congress did *not* intend to create, by implication, private causes of action under those provisions against commodity exchanges and their officials.

A. The 67th Congress (1921 and 1922) Did Not Intend to Create, By Implication, A Private Cause of Action Under Section 5(d).

Section 5(d) [7 U.S.C. §7(d)] is a carryover (substantially *in haec verba*) from section 5(d) of the Future Trading Act of 1921 (Act of August 24, 1921, ch. 86,

42 Stat. 187).[7] The purpose of that legislation, as stated by its House sponsor, was for the protection of *producers*, and was specifically directed *against speculators*. See 61 *Cong. Rec.* 1314 (May 11, 1921) (remarks of Rep. Tincher); see also 61 *Cong. Rec.* at 1318 (remarks of Rep. Purnell); 61 *Cong. Rec.* 4761, 4765 (Aug. 9, 1921) (remarks of Sen. Capper, the Senate sponsor); 62 *Cong. Rec.* 12720-12725 (Sept. 15, 1922).

All of section 5, including subsection (d), is, and was clearly intended to be, a licensing requirement. See, *e.g.*, 61 *Cong. Rec.* 1318, 1325 (remarks of Rep. Purnell). Its purpose is simply to require that commodity exchanges, in order to be licensed, must have rules and regulations (*administrative machinery*) to deal with manipulation, and the CFTC (then the Secretary of Agriculture) "is to determine whether they have adopted proper rules" as

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[7] Section 5(d) of the Future Trading Act of 1921 authorized designation of an exchange as a "contract market" "[w]hen [*inter alia*] the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board." (42 Stat. 188). Following the Supreme Court's decision in *Hill* v. *Wallace*, 259 U.S. 44 (1922), declaring aspects of the 1921 Act unconstitutional, this language was reenacted verbatim as section 5(d) of the Grain Futures Act of 1922 (Act of September 21, 1922, ch. 369, 42 Stat. 998). (The commas separating the phrase "or the cornering of any grain" were deleted, however). The constitutionality of the 1922 Act was upheld in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923). In 1936, the Act was renamed the Commodity Exchange Act, and section 5(d) was amended by substituting "commodity" for "grain" and "and" for "or" in the phrase "or the cornering of any grain." [Act of June 15, 1936, ch. 545, §§1, 6(b), 49 Stat. 1491, 1497]. Section 5(d) has not been amended since 1936. See *Leist*, 638 F.2d. at 293-94.

part of its licensing procedures. 61 *Cong. Rec.* 1390 (May 12, 1921) (remarks of Rep. Chindblom). See also 61 *Cong. Rec.* 5559 (Aug. 23, 1921) (remarks of Rep. Haugen); *Hill* v. *Wallace*, 259 U.S. 44, 64; *Hearings Before the Senate Committee on Agriculture and Forestry on H.R. 6772*, 74th Cong., 2d Sess. 246 (1936) (testimony of W. Berge, Special Ass't to the Attorney General); "Federal Regulation of Commodity Futures Trading," 60 *Yale L. J.* 822, 834 (1951).

There is nothing in the legislative history of section 5(d)—either at its enactment in 1921, its reenactment in 1922, or its technical amendment in 1936[8]—that in any way suggests that Congress intended to create a private cause of action under this licensing provision against a commodity exchange and its officials.[9] See *e.g.*, 61 *Cong. Rec.* 1312-1341 (May 11, 1921); 62 *Cong. Rec.* 12720-12725 (Sept. 15, 1922).[10]

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[8] See note 7.

[9] In this regard, it should be noted that section 5(d) was enacted well before the so-called "judicial rush" to imply private causes of action. See *Leist*, 638 F.2d at 296; also at 344 (Mansfield, J., dissenting). Regarding the implication of private causes under licensing requirements, see *Redington*, 442 U.S. at 569 (basis for implication lacking).

[10] See also:

1921: H. R. Rep. No. 44, 67th Cong., 1st Sess. (1921); S. Rep. No. 212, 67th Cong., 1st Sess. (1921); H. R. Rep. No. 345, 67th Cong., 1st Sess. (1921); H. R. Rep. No. 362, 67th Cong., 1st Sess. (1921); 61 *Cong. Rec.* 1312-1341 (May 11, 1921); 61 *Cong. Rec.* 1366-1399 (May 12, 1921); 61 *Cong. Rec.* 4646-4654 (Aug. 4, 1921); 61 *Cong. Rec.* 4760-4771 (Aug. 9, 1921); 61 *Cong. Rec.* 5027-5031 (Aug. 15, 1921); 61 *Cong. Rec.* 5518-5520 (Aug. 23, 1921); 61 *Cong. Rec.* 5555-5562 (Aug. 23, 1921).

In this regard, section 5(d) stands in sharp contrast to the express private remedies created in the Packers and Stockyards Act of 1921, which became law during the same month of 1921 as the Future Trading Act, and which was written by the same congressional committees. (Act of August 15, 1921, ch. 64, 42 Stat. 159).[11] Section 308 of the Packers and Stockyards Act provided that any stockyard, market agency, or dealer that violates specified sections of the Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation"; and that such liability may be enforced either by suit in a federal district court or by complaint to the Secretary of Agricul-

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[10] (Continued)

1922: H. R. Rep. No. 1095, 67th Cong., 2d Sess. (1922); S. Rep. No. 871, 67th Cong., 2d Sess. (1922); 62 *Cong. Rec.* 9175-9178 (June 22, 1922); 62 *Cong. Rec.* 9403-9450 (June 26, 1922); *Hearings Before the Senate Comm. on Agriculture & Forestry on H. R. 11843*, 67th Cong., 2d Sess. (1922); 62 *Cong. Rec.* 12564-12568 (Sept. 14, 1922); 62 *Cong. Rec.* 12720-12725 (Sept. 15, 1922).

1936: H. R. Rep. No. 421, 74th Cong., 1st Sess. (1935); 79 *Cong. Rec.* 8586-8595 (June 3, 1935); 79 *Cong. Rec.* 14246 (Aug. 23, 1935); 80 *Cong. Rec.* 6159-6164 (April 27, 1936); 80 *Cong. Rec.* 6612-6613 (May 4, 1936); 80 *Cong. Rec.* 7845-7883 (May 25, 1936); 80 *Cong. Rec.* 7905-7912, 7916-7918 (May 26, 1936); 80 *Cong. Rec.* 8010-8090 (May 27, 1936); 80 *Cong. Rec.* 8288-8293 (May 29, 1936); 80 *Cong. Rec.* 8824-8825 (June 3, 1936); *Hearings Before the Senate Comm. on Agriculture & Forestry on H. R. 6772*, 74th Cong., 2d Sess. (1936).

[11] See H. R. Rep. No. 77, 67th Cong., 1st Sess. 1, 11 (1921); H. R. Rep. No. 324, 67th Cong., 1st Sess. (1921). See also *Stafford* v. *Wallace*, 258 U.S. 495, 499 (1922); G. O. Virtue, "Legislation for the Farmers: Packers and Grain Exchanges," 37 *Quar. J. of Econ.* 687, 693 (1923).

ture as provided in section 309 of the Act.[12] (42 Stat. 165). Clearly Congress, even in 1921, knew precisely how to (and did) create private causes of action, *when it intended to do so.* See *Redington,* 442 U.S. at 572; *Transamerica Mortgage,* 444 U.S. at 20-21.

Congress was not unmindful, however, of the need to provide machinery for the enforcement of section 5(d) of the Commodity Exchange Act. As the Senate sponsor stated in 1921: "When it comes to the matter of enforcing the law, that power must be in some one. It would be absurd to enact a law without providing for its enforcement." 61 *Cong. Rec.* 4764 (Aug. 9, 1921) (remarks of Sen. Capper). Thus enforcement was expressly vested in a three-member federal commission (now the five-

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[12] Section 309 created an administrative reparations system whereby the Secretary could award monetary damages. Sections 308 and 309, as amended, are codified at 7 U.S.C. §§209, 210. Provisions similar to sections 308 and 309 are contained in the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. §§449e, 499f, and 499g). See H. R. Rep. No. 1041, 71st Cong., 2d Sess. 4 (1930); H. R. Rep. No. 1704, 71st Cong., 2d Sess. 4 (1930). In 1974 Congress obviously borrowed from section 309 and these analogous provisions in the Perishable Agricultural Commodities Act (7 U.S.C. §§499f and 499g) in creating an administrative reparations system under the Commodity Exchange Act. See *Hearings Before the House Comm. on Agriculture on H. R. 11955,* 93d Cong., 2d Sess. 253 (n.1) (testimony of C. W. Chapin) (1974); *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 & H. R. 13113,* 93d Cong., 2d Sess. 565 (1974) (testimony of B. H. Jones); Valdez, "Modernizing the Regulation of Commodity Futures Markets," 13 *Harv. J. Legis.* 35, 60 (1975). See also note 25, *infra.* Commodity exchanges and their officials are exempted from this system, however. Commodity Exchange Act, §14 (7 U.S.C. §18).

member CFTC), which was empowered to revoke or suspend an exchange's contract-market designation. See 42 Stat. 188, 1001; Commodity Exchange Act, §6 (7 U.S.C. §8); *Leist*, 638 F.2d at 293.[13]

The scope and purpose of section 5(d) as a licensing requirement is made manifest by actions taken in 1925 by the Secretary of Agriculture and the commodity exchanges then operating under federal designation. The Secretary indicated at that time that, in view of section 5(d), the exchanges would have to set up certain "administrative machinery" if they were to continue to maintain their contract market designations. In a 1926 report to the Secretary of Agriculture, the Administrator of the Grain Futures Act advised the Secretary that the exchanges "showed an excellent spirit of cooperation, and that these proposed reforms have been put into effect." Sen. Doc. No. 135 ("Fluctuations in Wheat Futures"), 69th Cong., 1st Sess. 13 (1926). Thus the exchanges had set in place the "administrative machinery" deemed necessary by the Secretary for compliance with section 5(d).

B. The 74th Congress (1936) Did Not Intend To Create, By Implication, A Private Cause of Action Under Section 9(b).

The Commodity Exchange Act's criminal penalty for manipulation, now contained in section 9(b) [7 U.S.C. §13(b)], was added to the Act in 1936. (Act of June

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[13] The constitutionality of the Act provision authorizing revocation or suspension of "contract market" designation (§6) was upheld in 1933 in *Board of Trade of the City of Chicago* v. *Wallace*, 67 F.2d 402, 407 (7th Cir. 1933), cert. denied, 291 U.S. 680 (1934). See H. Mayers, Federal Regulatory Legislation, the Federal Grain Futures Act," 2 *Geo Wash. L. Rev.* 457, 461 (1934).

19, 1936, ch. 545, §11, 49 Stat. 1501).[14] Although the Act's criminal provision (section 9) has been amended on subsequent occasions, the language relating to manipulation has not been substantially altered.[15]

By its plain terms, section 9(b) simply creates *criminal* sanctions against the manipulator. Section 9(b) clearly does not apply to an *exchange's* failure to *prevent* manipulation. In any event, there is nothing in the legislative history of the 1936 amendments which suggests that Congress intended to create, by implication, a private cause of action under section 9(b) against an exchange

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[14] As enacted in 1922, the Act's criminal provision (section 9) did not prescribe any criminal penalty for manipulation, although administrative proceedings could be brought for manipulation [section 6(b)]. See 42 Stat. 1002, 1003. The 1922 provision was adopted largely verbatim from section 10 of the Future Trading Act of 1921 (see 42 Stat. 191). [See note 7 and accompanying text concerning the 1921 Act and its reenactment in 1922 as the Grain Futures Act. See also Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 *Geo. Wash. L. Rev.* 215, 244 (1958)].

[15] The 1936 amending act added the following language to section 9 of the Act regarding manipulation: "[any person who shall] manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner any such commodity" [shall be deemed guilty of a misdemeanor, punishable by a maximum penalty of one year in prison and a $10,000 fine]. In 1968, the reference to "board of trade" was changed to "contract market"; the offense of manipulation was upgraded to a felony; and the maximum prison term was increased to five years. (Pub. L. No. 90-258, §18, 82 Stat. 31). In 1974, the maximum fine was increased to $100,000. [Pub. L. No. 93-463, §212(d)(2), 88 Stat. 1404]. In 1978, the maximum fine was increased to $500,000 for organizations. [Pub. L. No. 95-405, §19(2), 92 Stat. 875].

and its officials for market manipulation. In fact, the notion of implied causes of action against *anyone* for *any* violation of the Act was never considered.[16]

Consideration was again given, however, to the question of enforcement of the Act with respect to the commodity exchanges. To provide for greater enforcement flexibility, section 6b was added to authorize, in lieu of suspension or revocation of contract-market designation, the issuance of cease and desist orders against an exchange and its officials, with *criminal* sanctions for noncompliance with such orders. Commodity Exchange Act, §6b (7 U.S.C. §13a), Act of June 15, 1936, ch. 545, §9, 49 Stat. 1500. See H.R. Rep. No. 421, 74th Cong., 1st Sess. 8 (1935). This new section was added "to provide a method by which the degree of punishment may be measured against the degree f violation. It protects the interests of the producers and traders, *while at the same time it provides an adequate penalty for violations of the act.*" 80 *Cong. Rec.* 7859 (May 25, 1936) (remarks of Sen. Murray) (emphasis added). See also "Legislation: the Commodity Exchange Act of 1936," 85 *Univ. Pa. L. Rev.* 614, 621 (1937).

C. The 90th Congress (1968) Did Not Intend To Create, By Implication, A Private Cause of Action Under Section 5a(8).

Section 5a(8) [7 U.S.C. §7a(8)] was added to the Commodity Exchange Act in 1968, by section 12(b) of

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[16] See legislative materials cited at note 10. See also *Leist*, 638 F.2d at 337-38 (Mansfield, J., dissenting). It should be noted that this provision was also enacted well before the "judicial rush" to imply private causes of action. See *Leist* at 296; also at 344 (Mansfield, J., dissenting). Regarding the implication of private causes under criminal provisions, see *Transamerica Mortgage*, 444 U.S. at 19 (basis for implication lacking).

H. R. 13094 (Pub. L. No. 90-258, 82 Stat. 29).[17] Nothing in the legislative history of H.R. 13094 indicates any congressional intent to create a private cause of action under section 5a(8).[18] H.R. 13094 was, in fact, "a rather innocuous bill" containing "modest proposals." 113 *Cong Rec.* 34404, 34405 (Nov. 30, 1967) (remarks of Rep. Sullivan).

To the contrary, there is clear evidence that Congress expressly intended *not* to create a private cause of action under section 5a(8). H.R. 13094 was modeled closely on H.R. 9178, introduced by Representative Fino on April 26, 1967. See 113 *Cong. Rec.* 10838 (April 26, 1967) (remarks of Rep. Fino).[19] Representative Fino's bill contained a section that would have created an express private cause of action against commodity exchanges:

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[17] In 1974, a technical amendment was made to section 5a(8) to reflect the creation of the new CFTC and the powers granted to it under new section 5a(12) requiring affirmative CFTC approval of exchange rules relating to contract terms and other trading requirements. Otherwise, the substance of section 5a(8) was not altered. Commodity Futures Trading Commission Act of 1974, sec. 407, Pub. L. No. 93-463, 88 Stat. 1389.

[18] See S. Rep. No. 947, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 743, 90th Cong., 1st Sess. (1967); *Hearings Before the House Committee on Agriculture on H. R. 11930 and 12317*, 90th Cong., 1st Sess. (1967); 113 *Cong. Rec.* 10838 (Apr. 26, 1967), 23650 (Aug. 22. 1967), 34206 (Nov. 26, 1967), 34390, 34403 (Nov. 30, 1967); 114 *Cong. Rec.* 592 (Jan. 23, 1968), 2012 (Feb. 5, 1968). See also *Hearings Before the House Committee on Agriculture, Subcommittee on Domestic Marketing and Consumer Relations, on H.R. 11788*, 89th Cong., 2d Sess. (1966).

It must be noted also that section 5a(8), like section 5(d), is a licensing requirement. See note 9.

[19] The close similarity of the two bills was noted in *Leist*, 638 F.2d at 339 n. 11 (Mansfield, J., dissenting).

> Any contract market which engages in any act or practice constituting a violation of this Act, or any rule or order thereunder, or which negligently allows or aids, abets, counsels, commands, or induces any such violation, *shall be liable for consequential damages to any aggrieved person.* [Section 32 of H.R. 9178 (emphasis added)].

This section, however, was one of the few provisions of H.R. 9178 that was *not* incorporated in H.R. 13094, and thus was not enacted into law in 1968.

Moreover, the amendments accompanying the adoption of section 5a(8) further show that the 90th Congress did not intend to create a private cause of action under the section. Specifically, the adoption of section 5a(8) was so closely related to the adoption of three amendments substantially strengthening the government's ability to enforce section 5a generally that it is inconceivable that Congress intended private causes to be implied under section 5a(8) against commodity exchanges and their officials.

These amendments were as follows:

1. *Section 6b.* This provision was amended so that the Commodity Exchange Commission ("CEC") —one of the predecessors of the CFTC—could enforce the various requirements imposed on commodity exchanges by section 5a *both* by issuing a cease and desist order and by bringing a proceeding to suspend or revoke designation. (H.R. 13094, section 18). (See S. Rep. No. 947 at 10; see also the text following note 16, *supra*).

2. *Section 6(a).* This provision was expanded to empower the CEC to suspend or revoke a contract market's designation for the failure of a

contract market's officer, director, employee or agent to comply with any section 5a requirement. (H.R. 13094, section 15). (See S. Rep. No. 947 at 9).

3. *Section 2(a).* This provision was amended to make the CEC a more effective regulatory body. The amendment permitted the CEC's members, who were the Secretaries of Agriculture and Commerce and the Attorney General, to designate employees of their departments to serve in their place. [H.R. 13094, section 1(c).] (See S. Rep. No. 947 at 5).

The close relationship between the new requirement imposed by section 5a(8) and the broadening of the provisions for CEC enforcement of that requirement was noted during the hearings on the 1968 amendments:

> The upshot of section 5a(8), section 6(a), and section 6b, when read together, is that full responsibility is thrust upon the [contract] market and its employees for enforcing the Commodity Exchange Act and rules approved by the Secretary, *or they shall suffer the penalties attached thereto.* [*House Hearings on H.R. 11930 and 12317* at 37 (testimony of W. Theis, President, Kansas City Board of Trade) (emphasis added).]

D. In Amending the Commodity Exchange Act in 1974, the 93d Congress Did Not Intend to Create, By Implication, A Private Cause of Action Under Section 5(d), Section 5a(8), or Section 9(b).

In 1974 Congress enacted a number of significant amendments to the Commodity Exchange Act. H. R. 13113, Commodity Futures Trading Commission Act of

1974, Pub. L. 93-463, 88 Stat. 1389. Section 5(d), however, was not altered in any way; only technical, conforming amendments were made to section 5a(8); and, while section 9(b) was amended in some respects, its language relating to market manipulation was not changed.[20]

In connection with the 1974 amendments, the 93d Congress did have before it and did give serious consideration to several specific provisions relating to private causes of action, including actions against commodity exchanges under sections 5(d), 5a(8), and 9(b). None of these provisions was enacted into law. The bills which would have provided for private causes of action were:

—Representative Smith's bill, H. R. 11195;[21]

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[20] See notes 7, 15, 17; see also *Leist*, 638 F.2d at 295.

[21] Section 17(3), H. R. 11195, 93d Cong., 1st Sess. (1973); see also 119 *Cong. Rec.* 35483 (Oct. 30, 1973) (referral of H. R. 11195 to the House Comm. on Agriculture); *Hearings Before the House Comm. on Agriculture on H. R. 11955*, 93d Cong., 2d Sess. 1 (remarks of Ch. Poage), 2-11 (testimony of Rep. Smith) (1974); *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 and H.R. 13113*, 93d Cong., 2d Sess. 207-210 (1974) (testimony of Rep. Smith). Bills identical to H.R. 11195 were introduced by Representative Smith on November 7, 1973 [H.R. 11323, for himself and 23 co-sponsors (see 119 Cong. Rec. 36272) (Nov. 7, 1973) (referral to Comm. on Agriculture); and H.R. 11338, for himself and 20 co-sponsors (see 119 *Cong. Rec.* 36273) (Nov. 7, 1973) (referral to Comm. on Agriculture)] and on November 15, 1973 [H.R. 11538, for himself and 8 co-sponsors (see 119 *Cong. Rec.* 39191) (Nov. 15, 1973) referral to Comm. on Agriculture)]. All references to H.R. 11195 or "the Smith bill" in the following pages are intended to include H.R. 11323, 11338, and 11538 as well.

—Senator McGovern's bill (for himself and Senators McIntyre and Abourezk, S.2578;[22] and

—Senator Hart's bill (for himself and Senators Scott, Case, and Clark), S.2837.[23]

The Smith and McGovern bills, in identical language, would have authorized civil actions for treble damages against any person violating the Commodity Exchange Act or regulations thereunder. The Hart bill would have authorized civil actions for restitution (single damages) for any injury caused by a violation of the Act or of

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[22] Section 20(3), S.2578, 93d Cong., 1st Sess. (1973), printed at 119 *Cong. Rec.* 33948 (Oct 12, 1973) and at *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 and H.R. 13113*, 93d Cong., 2d Sess. 76-77 (1974); see also 119 *Cong. Rec.* 33943 (Oct. 12, 1973) (referral of S.2578 to the Senate Comm. on Agriculture & Forestry); 119 *Cong. Rec.* 33943-33945 (Oct. 12, 1973) (remarks of Sen. McGovern); 119 *Cong. Rec.* 36104 (Nov. 7, 1973) (addition of co-sponsors); 119 *Cong. Rec.* 36776 (Nov. 13, 1973) (remarks of Sen. McGovern); *Hearings on S.2578* at 195-197 (testimony of Sen. McGovern). Representative Smith's bill (H.R. 11195) was substantially identical to this bill.

[23] Section 505, S.2837, 93d Cong., 1st Sess. (1973), printed at 119 *Cong. Rec.* 42688 (Dec. 20, 1973) and at *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837 and H.R. 13113*, 93d Cong., 2d Sess. 118-120 (1974); see also 119 *Cong. Rec.* 42677 (Dec. 20, 1973) (referral of S.2837 to the Senate Comm. on Agriculture & Forestry); 119 *Cong. Rec.* 42681-42689 (Dec. 20, 1973) (remarks of Sen. Hart); *Hearings Before the House Comm. on Agriculture on H.R. 11955*, 93d Cong., 2d Sess. 237-243 (1974) (testimony of Sen. Clark); 120 *Cong. Rec.* 1899-1901 (Feb. 4, 1974) (remarks of Sen. Hart); 120 *Cong. Rec.* 13941-13951 (May 9, 1974) (remarks of Sen. Hart); 120 *Cong. Rec.* 13967-13969 (May 9, 1974) (remarks of Sen. Clark); *Hearings on S.2837* at 200-206 (testimony of Sen. Clark).

any rule, regulation or order of the Commission or an exchange, and treble damages for any "wilful" violation.

Although Representative Smith's bill, H.R. 11195, was referred to the House Agriculture Committee on October 30, 1973 (see 119 *Cong. Rec.* 35483), hearings were never held on that bill. Instead, hearings were held in January of 1974 on H.R. 11955, which had been introduced by the Chairman of the House Agriculture Committee (Mr. Poage, on behalf of himself and members of a special ad hoc subcommittee) on December 13, 1973 (see 119 *Cong Rec.* 4133).

It is clear, however, that the Smith bill (H.R. 11195) was the model for H.R. 11955. Chairman Poage, at the beginning of the January 1974 hearings, expressly acknowleged the contributions of Representative Smith and made specific reference to H.R. 11195. Representative Smith was the first witness at these hearings, and observed at the outset that "[t]he new bill which the Committee introduced on December 13, H.R. 11955, is identical or very similar to H.R. 11195 which I had introduced on October 30 in a vast majority of its provisions." *Hearings Before the House Comm. on Agriculture on H.R. 11955,* 93d Cong., 2d Sess. 1 (remarks of Ch. Poage), 2 (testimony of Rep. Smith) (1974).[24]

Representative Smith's provision relating to private causes of action was one of the few provisions of his bill which was *not* incorporated in Chairman Poage's bill (H.R. 11955). Instead—and obviously borrowing from the

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[24] Set forth below is a list of the many sections of the Poage bill (H.R. 11955) that were identical to, or substantially the same as, provisions of the Smith bill (H.R. 11195) [and which was substantially identical to the McGovern bill (S.2578)].

Packers and Stockyards Act of 1921 and the Perishable Agricultural Commodities Act of 1930[25]—an administrative reparations system was proposed (and subsequently enacted into law). Commodity exchanges and their officials were (and are) expressly exempted from this system.[26]

In borrowing from the Packers and Stockyards Act and the Perishable Agricultural Commodities Act,[27] however, Chairman Poage and his special ad hoc subcommittee did *not* borrow from the provisions of these Acts which expressly authorize private damage suits in federal courts, as well as administrative reparations.[28]

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[24] (Continued)

H.R. 11955 (Poage)	H.R. 11195 (Smith)	H.R. 11955 (Poage)	H.R. 11195 (Smith)
101	12, 15, 16	212	1
102	13	213	3
103	14	215	3 (proviso)
104	20	510	22
201	5	511	22
204	18	*Compare also*	
207	11	203	8
209	6 (1st ¶)	205	9
211	2	208	3

[25] For example, *compare* 7 U.S.C. §§499f & 499g *with* section 105, H.R. 11955, 93d Cong., 1st Sess. (1973), printed at *Hearings Before the House Agriculture Comm. on H.R. 11955*, 93d Cong., 2d Sess. 341-47 (1974). See also note 12 and accompanying text.

[26] Commodity Exchange Act, §14 (7 U.S.C. §18).

[27] See 7 U.S.C. §§209, 499e; see also note 12.

[28] A cause of action was *not* implied under sections of the Packers and Stockyards Act not specified in Section 308. *Pacific Trading Co.* v. *Wilson & Co.*, 547 F.2d 367 (1976). Section 308 (7 U.S.C. §209) was amended in 1976 to apply to any *person* who violates *any* provision of that Act. Pub. L. No. 94-410, §6, 90 Stat. 1250. [See Sen. Rep. No. 94-932, 94th Cong., 2d Sess. 2, 7 (1976)].

As a result of the January 1974 hearings, a revised H.R. 11955 was introduced on February 27, 1974 by Chairman Poage (under the co-sponsorship of Representative Smith) as H.R. 13113 (93d Cong., 2d Sess). Once again, Representative Smith's provision relating to private causes of action was not incorporated. The provision for reparations in lieu of private suits remained intact, however.

H.R. 13113 passed the House on April 11, 1974. (See 120 *Cong. Rec.* 10736-10769). Thereafter, in May of 1974, hearings were held by the Senate Agriculture and Forestry Committee on H.R. 13113, and also on the McGovern and Hart bills (S.2578 and S.2837) and a bill which Senator Humphrey had introduced (S.2485).[29]

Following these hearings on S.2485, S.2578, S.2837, and H.R. 13113, the Senate Agriculture and Forestry Committee reported favorably on H.R. 13113, but with an amendment in the nature of a substitute. See Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 1 (1974); H.R. 13113, 93d Cong., 2d Sess. [Calendar No. 1080 (August 29, 1974)]. The Senate Substitute Bill reflected a thorough consideration of all four bills which had been the subject of the May hearings, including the Hart bill (S.2837) which provided for single and treble damage actions. See Sen. Rep. No. 93-1131 at 20.

In fact, no less than four provisions of the Hart bill (S. 2837) were incorporated substantially verbatim in the

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[29] Like the Poage bill (H.R. 11955 and, as revised, H.R. 13113), the Humphrey bill contained no provision relating to private causes of action. Once again, it should be noted that the McGovern bill (S.2578) was substantially identical to the Smith bill (H.R. 11195), on which the Poage bill (H.R. 11955) was modeled (see note 22).

Senate Substitute Bill. These provisions related to exchange disciplinary decisions,[30] market reporting,[31] daily trading reports,[32] and investor protection.[33] The Senate Committee, however, did not incorporate into its Substitute Bill the provision in the Hart bill (S.2837, section 505) authorizing damage actions for violations of the Act.

At the time of both the Senate and House deliberations in 1974 which led to adoption of H.R. 13113 as the Commodity Futures Trading Commission Act of 1974, this Court had already decided *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), the *Amtrak* case, which recited with favor the principle of *expressio unius est exclusio alterius* in denying an implied cause of action under 45 U.S.C. §547.[34]

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[30] Section 216 of the Senate Substitute Bill: derived substantially verbatim from section 203 of S.2837. [For the text of section 203, see *1974 Sen. Hearings* at 94-96. See also Commodity Exchange Act, section 8c (7 U.S.C. §12c)]

[31] Section 314: derived substantially verbatim from section 211 of S.2837. [See *1974 Sen. Hearings* at 102. See also Commodity Exchange Act, section 16 (7 U.S.C. §20)].

[32] Section 315: derived substantially verbatim from section 208(b)-(d) of S.2837. [See *1974 Sen. Hearings* at 99-100. See also Commodity Exchange Act, section 4g(2)-(6) (7 U.S.C. §6g(2)-(6))]

[33] Section 316: derived substantially verbatim from §303(a)(2) of S.2837. (See *1974 Sen. Hearings* at 104-105). (This provision was deleted in Conference).

[34] 414 U.S. at 458. The *Amtrak* case was decided on January 9, 1974. House Agriculture Committee hearings on the Poage bill were held on January 23-31, 1974. Senate Hearings were held on May 13-22, 1974. Final

The result in *Amtrak* was reached notwithstanding the fact (as Mr. Justice Douglas noted in a vigorous dissent) that the case was "on all fours" (and thus its holding was incompatible) with *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), the seminal case supporting implication of private causes of action under the federal securities laws. 414 U.S. at 471-72 (Douglas, J., dissenting).

Possibly in recognition of the particular significance of the *Amtrak* decision, Professor Roy Schotland of the Georgetown University Law Center urged, in his May, 1974 testimony before the Senate Agriculture Committee with regard to the reparations system contained in the Poage bill (H.R. 13113), that "if you do choose to retain any such virtually unprecedented responsibility and burden in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there." At the same time, Professor Schotland "enthusiastically" endorsed the provision in the Hart bill (S.2837, section 505) which would have authorized private civil suits for single and treble damages. *Hearings Before the Senate Comm. on Agriculture & Forestry on S.2485, S.2578, S.2837, and H.R. 13113*, 93d Cong., 2d Sess. 737-746 (1974). The Senate Committee, however, did not follow Professor Schotland's advice. While the reparations system was maintained, no language was added authorizing suits at law as well. Nor was section 505 of the Hart bill

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[54] (Continued)
legislative action was not taken until October 10, 1974, some 10 months after the *Amtrak* decision. See 120 *Cong. Rec.* 34995-35003 (conference report agreed to by Senate).

(S.2837) incorporated into the Substitute Bill reported by the Senate Committee.[35]

H.R. 13113, as amended, passed the Senate on September 9, 1974. (See *120 Cong. Rec.* 30458-30468). Following conference, final legislation was enacted on October 10, 1974 (see 120 *Cong. Rec.* 34995-35003) which created a reparations system but made no provision to create private causes of action at law, either along the lines proposed by Representative Smith and Senators McGovern and Hart, or as provided for in the Packers and Stockyards Act of 1921 and the Perishable Agricultural Commodities Act of 1930.[36]

E. In Amending the Commodity Exchange Act in 1978, the 95th Congress Did Not Intend to Create, By Implication, A Private Cause of Action Under Section 5(d), Section 5a(8), or Section 9(b).

The 1974 amendments to the Commodity Exchange Act included a so-called "sunset" provision (see 88 Stat. 1391) which resulted, in 1978, in extensive congressional review of the Act and of CFTC operations. A number of amendments to the Act were made as a result of this review. (Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865).

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[35] Undoubtedly Professor Schotland was also aware that the Court in *Amtrak* had also placed great weight on the fact that a proposal had been before the responsible congressional committee to amend the provision there in question, to expressly provide for a private cause of action, and that the proposal had not been adopted. See 414 U.S. at 458-461.

[36] For additional analysis of the legislative history of the 1974 amendments as they relate to the issue of private causes of action, see *Leist,* 638 F.2d at 344-47 and 351-53 (Mansfield, J., dissenting).

No provision was enacted, however, to create a private cause of action against exchanges or their officials, and none was considered. A provision was enacted [section 6d of the Act (7 U.S.C. §13a-2)] to authorize suits by state officials for violations of the Act, in order, among other things, "to obtain damages on behalf of their residents." Exchanges and their officials are expressly exempted from this provision, however. In the words of the House Agriculture Committee:

> The power to enforce the requirements of the Act with respect to the organized exchanges remains *solely* with the Commission. [H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 15-16 (1978) (emphasis added)]

Sections 5(d) and 5a(8) were not altered in any way by the 1978 amendments. While section 9(b) was altered in some respects, its language relating to market manipulation was not changed.[37] Thus there is no evidence which suggests that the 95th Congress intended to create, by implication, a private cause of action under section 5(d), 5a(8), or 9(b).[38]

This analysis of the specific legislative histories of sections 5(d), 5a(8), and 9(b) of the Commodity Exchange Act, as well as amending legislation enacted in 1974 and 1978, clearly establishes that Congress did not intend to create, by implication, private causes of action under those provisions against commodity exchanges and their officials. To the contrary, Congress has assiduously avoided creating such causes on several occasions, while

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[37] See notes 7, 15, 17; see also *Leist*, 638 F.2d at 295.

[38] For additional analysis of the legislative history of the 1978 amendments as they relate to the issue of private causes of action, see *Leist*, 638 F.2d at 353-54 (Mansfield, J., dissenting).

enacting many other provisions of bills which would have done so. Moreover, while obviously borrowing from other statutes in important respects, it has *not* borrowed from related provisions in those statutes which expressly create private causes.[39]

F. Implying A Private Cause of Action Against A Commodity Exchange and Its Officials Would Frustrate the Underlying Purpose of The Legislative Scheme.

Congress' clear intention *not* to create a private cause of action against commodity exchanges and their officials is further evidenced by an analysis of the scheme of the Commodity Exchange Act. This analysis is particularly relevant because a private cause of action "should not be implied if it would frustrate the underlying purpose of the legislative scheme." *Cannon,* 441 U.S. at 703. Such would be the result, however, if private causes of action are implied against commodity exchanges and their officials under the Commodity Exchange Act.

Congress has designed the Commodity Exchange Act "to provide a uniform regulatory structure covering all futures trading . . . [and] to allow for the extension of

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[39] Thus, implying private causes under these circumstances raises important questions of constitutional law. Article I of the Constitution vests legislative powers exclusively in Congress. And Congress has repeatedly refrained from providing any private cause of action against commodity exchanges and their officials under any provision of the Commodity Exchange Act. See *Cannon* v. *University of Chicago,* 441 U.S. 677, 730 (1979) (Powell, J., dissenting). See also *Wilson* v. *First Houston Investment Corp.,* 566 F.2d 1235, 1243-45 (5th Cir. 1978) (Hill, J., dissenting), *vacated* (and remanded for further consideration in light of *Transamerica Mortgage*), 444 U.S. 959 (1979).

the economic benefits of futures trading under this structure to those areas of commerce where the risk-shifting and price-discovery functions of futures markets might prove to be of value." [Sen. Rep. No. 95-850, 95th Cong., 2d Sess. 10 (1978)].

So designed, the Act constitutes an elaborate legislative scheme in which Congress has provided a "pervasive panoply of judicial and administrative means for enforcing compliance with the Act".[40] These include civil fines, compensatory reparations, arbitration, cease and desist orders, injunctive and emergency orders, and criminal penalties. At the same time, however, Congress has expressly recognized and codified the critical, central role of the commodity exchanges. See, *e.g.*, 7 U.S.C. §§6; 6b; 6c; 6f; 6g; 6h; 7; 7a; 12a(6); 12a(9); 12c.

Operating under pervasive CFTC *oversight*, exchange self-regulation remains the first line of defense of the legislative scheme. Self-regulation is, as Congress recognized in 1974, a concept which "has been followed by the exchanges since their inception, *and continually encouraged by the Congress.*" [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 44 (1974) (emphasis added)]. As Congress also recognized in 1974, self-regulation operates under a system of commodity exchange rules or bylaws which are "descriptive of 'ideal industry practice.'" The role of the exchanges is to "encourage their members to strive toward that ideal." [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 45 (1974)]. For that reason, "nearly all [commodity] exchanges have nebulous rules prohibiting [for example] 'inequitable conduct' or 'unbusinesslike dealings.'" [Id.]

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[40] *Leist*, 638 F.2d at 323 (Mansfield, J., dissenting).

In this environment, the potential for mischief through private actions testing the sufficiency of self-regulatory efforts is obvious. Scores of different district courts may be called upon, not only to render their own interpretations of commodity exchange rules, but also to decide the quantum of self-regulatory vigor to be expected of the exchanges. Such a result is diametrically opposed to the plan of centralized, uniform regulation embodied in the Commodity Exchange Act. Indeed, Congress in 1974 gave the CFTC a rare grant of "exclusive jurisdiction" over the exchanges *vis-a-vis* other federal and state regulatory agencies (7 U.S.C. §2), for the express purpose of assuring that "the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings." [120 *Cong. Rec.* 30459 (September 9, 1974) (remarks of Sen. Talmadge)].

Congress also gave the CFTC authority in 1974 to review and change all pertinent exchange rules, to examine exchange self-regulatory activities, and to assess civil penalties against an exchange and its officials for violating the Act or CFTC rules or orders. In granting this latter authority to the CFTC, Congress expressly mandated that, in determining the amount of penalty, the CFTC must consider whether the amount will "materially impair" the exchange's "ability to carry on its operations and duties." [Section 6b (7 U.S.C. §13a)]. Federal courts, of course, are not subject to these constraints and could award damages that "materially impair," if not destroy, the ability of a commodity exchange to carry on its important operations and duties.

The CFTC's review and enforcement powers are clearly adequate to protect the public. In addition, these powers promote the uniformity insisted upon by Congress and

also assure that the vital price-discovery and risk-shifting functions of futures markets will continue unimpaired. Under this scheme, there simply is no need, or place, for private suits.

Also, the nature of exchange and exchange-related "violations" of the Commodity Exchange Act differs sharply from the type of misconduct generally outlawed by the Act. To the extent that an exchange and its officials fall short of effective self-regulation in a specific instance, they inflict no direct injury upon the public. Rather, the injury results from the actions of others which the exchange and its officials did not (and, more likely, *could not*) prevent.

Moreover, the imposition of private liability is incompatible with the law-enforcement role which exchanges and their officials—who, in most instances, are uncompensated volunteers—must perform under the Commodity Exchange Act. If the scheme of the Act is to be maintained—and not be frustrated—commodity exchanges and their officials must conduct their investigative efforts under the Act in a vigorous and conscientious manner without regard to whether the evidence accumulated by them might aid plaintiffs in suits against them or weaken their own defense against damage claims. They must act as or serve on impartial disciplinary tribunals under the Act and reach objective decisions of guilt or innocence without regard to whether their decisions buttress a plaintiff's case against them or jeopardize their defense.

In addition to being able to perform their law-enforcement responsibilities in a vigorous and conscientious manner, without fear of the consequences, commodity exchanges and their officials must be free to set strict and comprehensive standards of conduct, even though a higher

"failure rate" of compliance can be expected, without fear that their less-than-perfect regulatory record will expose them to massive private damage liability. They must be free to enlist the services of dedicated and talented members and staffs to administer their self-regulatory programs, without exposing them to the unacceptable risks of personal liability to private parties. And most fundamentally, they must be free to devote limited exchange resources to self-regulation as mandated by the Commodity Exchange Act, *not* to the costly defense of private damage actions.

These many factors, we submit, underlie Congress' repeated refusal to create private causes of action against commodity exchanges and their officials, and refute any suggestion that Congress somehow could have "intended" that such causes should be implied by the courts.

CONCLUSION

The EXCHANGES, as *amici curiae,* respectfully urge that the decision of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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